Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1064

JACK B. KREMENS, et al.,

*Appellants,*

v.

KEVIN BARTLEY, et al.,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

## BRIEF FOR APPELLEES

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*Texts and Authorities:*

Alanen, *The Family in the Pathogenesis of Schizophrenia and Neurotic Disorders*, 24 Acta Psychiatrica et Neurologica Scandinavica, Supp. 189 (1966) ..... 57

American Bar Foundation (Brakel & Rock, eds.), *The Mentally Disabled and the Law* (1971) ..... 70

Barton, *Institutional Neurosis* (2d Ed. 1966) ..... 36

Baumeister, *Residential Facilities for the Mentally Retarded* (1970) ..... 45

Bazelon, *Forward, Symposium: Mental Illness, the Law and Civil Liberties*, 13 Santa Clara Law. 367 (1973) ..... 65

Beck, *Reliability of Psychiatric Diagnoses: A Critique of Systematic Studies*, 119 Amer. J. of Psychiatry 210 (1962) ..... 63

Belknap, *Human Problems of State Mental Hospitals* (1956) ..... 36

Blackstone, *Commentaries on the Laws of England* (Wendell, ed., 1852) ..... 29,30



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Braginsky & Braginsky, *Hansels and Geetels: Studies of Children in Institutions for the "Mentally Retarded"* (1971) ..... 48

Braginsky, et al., *Methods of Madness: The Mental Hospital as a Last Resort* (1969) ..... 48

Burt, *Constitutional Rights Of, In and For Children*, 39 Law and Contemporary Problems 118 (1975) .... 34,53

Cohen, et al., *Mental Health Services*, in Hobbs, ed., *Issues in the Classification of Children*, Vol. I, 88 (1975) ..... 38

Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 Tex. L. Rev. 424 (1966) ..... 39,77

Chesler, *Women and Madness* (1972) ..... 63

Dept. of Health, Education and Welfare, NIMH, *Statistical Note 90, Utilization of Psychiatric Facilities by Persons Under 18 Years of Age, United States, 1971* ..... 37

Dept. of Health, Education and Welfare, NIMH, *Statistical Note 105, Legal Status of Inpatient Admissions to State and County Mental Hospitals, United States, 1972* ..... 37,38

Dept. of Health, Education and Welfare, NIMH, *Statistical Note 111: Age, Sex, and Color Variations in the Diagnostic Distributions of Admissions to Inpatient Services of State and County Mental Hospitals, United States, 1972* ..... 37

Dept. of Health, Education and Welfare, NIMH, *Statistical Note 113, State Trends in Resident Patients – State and County Mental Hospital Inpatient Services 1967-1973* ..... 37

Dept. of Health, Education and Welfare, NIMH, *Statistical Note 130, Residential Treatment Centers for Emotionally Distrubed Children 1973-1974* ..... 38

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Dept. of Health, Education and Welfare, *Mental Retardation Sourcebook* (1972) ..... 41

Deutsch, *The Mentally Ill in America* (2d ed. 1949) ..... 36

*Developments in the Law – Civil Commitment of the Mentally Ill*, 87 Harv. L. Rev. 1190 (1974) .. 36,71,73

Edelman, Goldberg & Werts, *The Reliability of Clinicians' Judgments: A Multi-Trait – Multi-Method Approach, 30 J. of Consulting Psychology 199 (1966)* ..... 63

Edgerton, et al., *Mental Retardation System*, in Hobbs, *Issues in the Classification of Children*, Vol. I, 63 (1975) ..... 41,44

Edgerton, *The Cloak of Competence: Stigma in the Lives of the Mentally Retarded* (1967) ..... 48

Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 Cal. L. Rev. 840 (1974) ..... 34,36,65

Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 Cal. L. Rev. 693 (1974) ..... 63

Eyman, et al., *Factors Determining Residential Placement of Mentally Retarded Children*, 76 Amer. J. of Mental Deficiency 693 (1966) ..... 42

Fleck, *Some Basic Aspects of Family Pathology*, in Wolman, ed., *Manual of Child Psychopathology* (1972) ..... 57

Goffman, *Asylums* (1961) ..... 35

Goldstein, Freud & Solnit, *Beyond the Best Interests of the Child* (1973) ..... 56

Gralicker, et al., *A Study of Factors Influencing Placement of Retarded Children in a State Residential Institution*, 69 Amer. J. of Mental Deficiency 553 (1965) ..... 42



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Gralnick, et al., "Mental Patients in Transition" in Greenblatt, ed., *Mental Patients in Transition* (1961) ..... 36

Grob, *Mental Institutions in America: Social Policy to 1875* (1973) ..... 36

Harris, *Mental Illness, Due Process and Lawyers*, 55 A.B.A.J. 65 (1969) ..... 72,77

Hobbs, *The Futures of Children* (1975) ..... 41,44,46,47

Joint Commission on Mental Health of Children, *Crisis in Child Mental Health – Challenge for the 1970's* (1970) ..... 41

Katz, Cole & Lowery, *Studies of the Diagnostic Process: The Influence of Symptom Perception, Past Experience and Ethnic Background in Diagnostic Decisions*, 125 Amer. J. of Psychiatry 937 (1966) ..... 63

Katz, Goldstein & Dershowitz, *Psychoanalysis, Psychiatry and the Law* (1967) ..... 36

Kittrie, *The Right to Be Different: Deviance and Enforced Therapy* (1971) ..... 36

Lee & Temerlin, *Social Class, Diagnosis and Prognosis for Psychotherapy*, in *Psychotherapy: Theory, Research and Practice* (1970) ..... 63

Lewis, Balla, et al., *Psychotic Symptomatology in a Juvenile Court Clinic Population*, 12 J. of the Amer. Academy of Child Psychiatry 660 (1973) ..... 40

Lidz, et al., *Schizophrenia and the Family* (1966) ..... 57

Lidz, et al., *The Intrafamilial Environment of Schizophrenic Patients. II. Marital Schism and Marital Skew*, 114 Amer. J. of Psychiatry 281 (1957) ..... 57

Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment*, 117 U. Pa. L. Rev. 75 (1968) ..... 64

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Meeks, *The Fragile Alliance* (1971) ..... 39

Miller & Kenney, *Adolescent Delinquency and the Myth of Hospital Treatment*, 12 Crime and Delinquency 38 (1966) ..... 40

National Association of Superintendents of Public Residential Services for the Mentally Retarded, *Current Trends and Status of Public Residential Services for the Mentally Retarded: 1974* (1975) .. 41,42,44

Pasamanik, Divity & Lefton, *Psychiatric Orientation and Its Relation to Diagnosis and Treatment in a Mental Hospital*, 116 Amer. J. of Psychiatry 127 (1959) ..... 63

Pound, *Individual Interests in the Domestic Relations*, 14 Mich. L. Rev. 177 (1916) ..... 54

Rosenhan, *On Being Sane in Insane Places*, 13 Santa Clara Law. 379 (1973) ..... 65

Rosensweig, et al., *A Study of the Reliability of the Mental Status Examination*, 117 Amer. J. of Psychiatry 1102 (1961) ..... 63

Roth, Dayley & Lerner, *Into the Abyss: Psychiatric Reliability and Emergency Commitment Statutes*, 13 Santa Clara Law. 400 (1973) ..... 64

Rothman, *The Discovery of the Asylum: Order and Disorder in the New Republic* (1971) ..... 36

Scheff, *Being Mentally Ill: A Sociological Theory* (1966) ..... 64

Schwartz, *Rehabilitation of Mental Hospital Patients*, Public Health Monograph No. 17 (1953) ..... 36

Stanton & Schwartz, *The Mental Hospital* (1954) ..... 36

Szasz, *Civil Liberties and the Mentally Ill*, 9 Clev-Mar. L. Rev. 399 (1960) ..... 65,76

Tizard, *The Role of Social Institutions in the Causation, Prevention and Alleviation of Mental Retardation*, in Haywood, *Social-Cultural Aspects of Mental Retardation* (1970) ..... 46





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Tribe, *Childhood, Suspects Classification, and Conclusive Presumptions*, 39 Law and Contemporary Problems 8 (1975) ..... 34

Vail, *Dehumanization and the Institutuional Career* (1966) ..... 36

Weiss & Pizer, *Hospitalizing the Young: Is It for Their Own Good?*, 54 Mental Hygiene 498 (1970) ..... 40

Wing & Brown, *Institutionalization and Schizophrenia* (1970) ..... 36

Wohlman, *Children Without Childhood: A Study in Childhood Schizophrenia* (1970) ..... 57

Wohlman, *Family Dynamics and Schizophrenia*, 6 J. of Health and Human Behavior 147 (1965) ..... 57

Wolfensberger, *The Origin and Nature of Our Institutional Models*, in Kugel & Wolfensberger, eds., *Changing Patterns in Residential Services for the Mentally Retarded* (1969) ..... 45

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## BRIEF FOR APPELLEES

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## QUESTIONS PRESENTED

1. Does the involuntary indeterminate mental institutionalization of juveniles by the state, without notice, counsel, hearing or other protections but upon parental application, violate the requirements of the Due Process Clause of the Fourteenth Amendment?

2. Did the District Court abuse its discretion in requiring the defendant state officials to assure that juveniles, presently committed, receive constitutional state procedures to determine whether they are mentally disabled and in need of institutionalization?

3. Does the District Court's requirement of constitutional state procedures to continue the confinement of juveniles unconstitutionally committed violate the Eleventh Amendment to the Constitution of the United States?

## STATUTES INVOLVED

In addition to the statutes reproduced by appellants, the following statutes were enacted by Pennsylvania on July 9, 1976.

### Mental Health Procedures Act
### Act No. 143

*Section 103. Scope of Act.*—This act establishes rights and procedures for all involuntary treatment of mentally ill persons, whether inpatient or outpatient, and for all voluntary inpatient treatment of mentally ill persons. "Inpatient treatment" shall include all treatment that requires full or part-time residence in a facility. For the purpose of this act, a "facility" means any mental health establishment, hospital, clinic, institution, center, day care center, base service unit, community mental health center, or part thereof, that provides for the diagnosis, treatment, care or rehabilitation of mentally ill persons, whether as outpatients or inpatients.

*Section 201. Persons Who May Authorize Voluntary Treatment.*—Any person 14 years of age or over who believes that he is in need of treatment and substantially understands the nature of voluntary



commitment may submit himself to examination and treatment under this act, provided that the decision to do so is made voluntarily. A parent, guardian, or person standing in loco parentis to a child less than 14 years of age may subject such child to examination and treatment under this act, and in so doing shall be deemed to be acting for the child. Except as otherwise authorized in this act, all of the provisions of this act governing examination and treatment shall apply.

*Section 202. To Whom Application May be Made.*—Application for voluntary examination and treatment shall be made to an approved facility or to the county administrator, veterans administration or other agency of the United States operating a facility for the care and treatment of mental illness. When application is made to the county administrator, he shall designate the approved facility for examination and for such treatment as may be appropriate.

*Section 204. Notice to Parents.*—the director of the facility shall promptly notify the minor's parents, guardian, or person standing in loco parentis, and shall inform them of the right to be heard upon the filing of an objection. Whenever such objection is filed, a hearing shall be held within 72 hours by a judge or mental health review officer, who shall determine whether or not the voluntary treatment is in the best interest of the minor.

*Section 206. Withdrawal from Voluntary Inpatient Treatment.*—(a) A person in voluntary inpatient treatment may withdraw at any time by giving written notice unless, as stated in section 203, he has agreed in writing at the time of his admission that his release can be delayed following such notice for a period to be specified in the agreement, provided that such period shall not exceed 72 hours.

(b) If the person is under the age of 14, his parent, legal guardian, or person standing in loco parentis may effect his release. If any responsible party believes that it would be in the best interest of a person under 14 years of age in voluntary treatment to be withdrawn therefrom or afforded treatment constituting a less restrictive alternative, such party may file a petition in the Juvenile Division of the court of common pleas for the county in which the person under 14 years of age resides, requesting a withdrawal from or modification of treatment. The court shall promptly appoint an attorney for such minor person and schedule a hearing to determine what inpatient treatment, if any, is in the minor's best interest. The hearing shall be held within ten days of receipt of the petition, unless continued upon the request of the attorney for such minor. The hearing shall be conducted in accordance with the rules governing other Juvenile Court proceedings.

(c) Nothing in the act shall be construed to require a facility to continue inpatient treatment where the director of the facility determines such treatment is not medically indicated. Any dispute between a facility and a county administrator as to the medical necessity for voluntary inpatient treatment of a person shall be decided by the Commissioner of Mental Health or his designate.

*Section 501. Effective Date and Applicability.*—This act shall take effect 60 days after its enactment and shall thereupon apply immediately to all persons receiving voluntary treatment. As to all persons who were made subject to involuntary treatment prior to the effective date, it shall become applicable 180 days thereafter.



*Section 502. Repeals.*—(a) The definition of "mental disability" in section 102, and sections 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 416, 418, 419, 420 and 426, act of October 20, 1966 (3rd Sp. Sess., P.L. 96, No. 6), known as the "Mental Health and Mental Retardation Act of 1966," are hereby repealed, except in so far as they relate to mental retardation or to persons who are mentally retarded. * * *

*Section 503. Severability.*—If any provision of this act including, but not limited to, any provision relating to children or the application thereof including but not limited to an application thereof to a child is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provisions or application and to this end of the provisions of this act are declared severable.

## STATEMENT OF THE CASE

On November 16, 1972, plaintiffs filed this class action against state officials[1] challenging those portions

[1] The defendants included the Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania which "has the power and duty to enforce" the state mental health law, to "make all regulations necessary and appropriate," and to "operate and assign functions to all state facilities." and the Deputy Secretary for Mental Health and Mental Retardation (277a). The superintendent of Haverford State Hospital, who is responsible for receiving applications for admission, commitment and release under the challenged statutes, was "sued as representative of the directors of all mental health facilities in Pennsylvania," all of which are under the authority of the defendants Secretary and Deputy Secretary (275a). In Pennsylvania, all mental institutions, public and private, are facilities subject to the statute and regulations. 50 P.S. §4102. Department of Public Welfare Regulations, Title 9100 (291a).

of Pennsylvania mental health statutes which permit the state to detain persons eighteen years of age or younger in mental institutions without substantial procedural protections including, *inter alia*, notice, counsel and opportunity for hearing. "In essence, plaintiffs claim that the present procedures do not adequately assure against the mistaken commitment of children who are not mentally ill." 786a - 787a; District Court Opinion, 402 F. Supp. at 1042 - 1043.[2]

A three-judge court was convened pursuant to 28 U.S.C. §§2281, 2284, and, prior to trial, extensive factual stipulations were entered into. At a three day hearing before the three judges, the testimony of six expert psychiatrists was heard. The depositions of three other psychiatrists were entered into evidence.

The class on whose behalf this action is maintained [3] includes "children who allegedly are mentally ill as well

[2]For convenience, all references to the District Court's reported opinion include the official citation thereof, 402 F. Supp. 1039 (E.D. Pa. 1975), in addition to reference to the Appendix.

[3]The defendants agreed to the District Court's suggestion that a guardian ad litem be appointed for the plaintiffs pursuant to Rule 17(c) of the Federal Rules of Civil Procedure: "With regard to the technicality involved, I am really at the courts' pleasure. I really do not object to the going through with Mr. Ferleger as a next friend." (250a). Thus, the issue suggested in an amicus brief of whether juveniles can ever initiate litigation by a next friend or guardian ad litem is not raised in this case. Brief of Michigan Association for Emotionally Disturbed Children *amicus curiae*. Regardless, federal courts have uniformly exercised their power under Rule 17(c) to protect minor litigants' interests where potential for parent-child conflict was present. *E. g., Roberts v. Ohio Casualty Insurance Co.*, 256 F.2d 35 (5th Cir. 1958).

The law in Michigan is equally clear and adverse to the *amicus* which fails to cite the leading case of *Buckholz v. Leveille* 194 N.W.2d 427 (Mich. 1975).



as children who allegedly are mentally retarded" (783a), 402 F. Supp. at 1041, n.1, who "have been, are, or may be admitted or committed to mental health facilities in Pennsylvania under the Pennsylvania Mental Health and Mental Retardation Act (Act)" (783a-784a).[4]

*Named Plaintiffs*

The named plaintiffs were five of the twenty-four juvenile retarded and mentally ill patients confined at Haverford State Hospital under the challenged statutes at the time the action was commenced (133a-134a).[5] They were confined after a psychiatric examination which lasted "anywhere from an hour to three quarters of an hour" (47a) "or shorter." *Id.* The reasons for admission of these persons (as stated by the hospital) were varied and included truancy, incorrigibility, homicidal and suicidal behavior, chaotic family, talking incoherently, rebellion, aggressive behavior, threats and assaults to family members, temper tantrums, sexual acting out, foul language, drug use and hallucinations (135a-165a). Treatment for the group included drugs, individual, group and family therapies, confinement to closed locked units, schooling, and confinement in seclusion rooms. *Id.*

[4]This inclusive class definition was uncontested by the defendants although they now undertake to criticize it. Brief for Appellants at 28, n. 16, 48; (275a).

[5]Eight additional juveniles were confined there under other sections of the law (133a - 134a). Children are held as civil "voluntary patients in the same treatment unit as those on criminal commitments." See Deposition of Dr. Barbara Armstrong (38a et seq., 135a - 165a).

At least ten of the juveniles were recorded as having objected to institutionalization at the time of admission; seven more objected after admission (122a-124a).[6] One "preferred to come rather than go to jail" (122a).

A summary of the commitment experiences of each of the named plaintiffs illustrates the fact patterns common to the class.[7]

Plaintiff K. B. was, and still is, critical of the hospital and believes that some of the hospital's regulations are arbitrary, that the staff played favorites with patients, that unnecessary punishments were imposed for minor rule infractions, and that patients were transferred to locked wards as punishment for mere allegations of wrong doing (277a-278a).[8] K. B. was diagnosed as a person with "Organic Brain Syndrome with epilepsy" and an "explosive personality." The hospital had some difficulty in its "efforts to work with his mother to allow her to become more receptive to his return to his home and community" (180a).

Electro-convulsive treatment (E. C. T.) was administered to plaintiff S. G. who was confined due to "his having become violent and aggressive towards his family and younger children in his neighborhood." He also received "high dosages of medication". Despite 61

[6]Juveniles whom the hospital psychiatrist considered "incompetent" to intelligently voice an objection are not included (122a - 124a). A number of these persons were deemed retarded.

[7]The statements are taken from either the parties' factual stipulations or hospital-prepared narrative summaries. See 166a *et seq.*

[8]Defendants admit that K. B. was critical as described but deny the validity of his beliefs (278a).



therapy sessions spaced over 15 months, his improvement was only marginal (172a-173a).

Plaintiff L. L.'s parents are divorced; her father is remarried and living in Florida; she would have (at the time of her commitment and the time this action was filed) liked to have been with her father because she gets along well with him. Every time she visits with her father, her behavior is excellent. L. L.'s difficulties in relating to her mother resulted in her commitment. Hospital records indicate Levine threatened the lives of her mother and sister and that she has a "personality disorder." (278a).

One expert testified that it is typical of many adolescents that, as in L. L.'s case, they will behave poorly and need hospitalization in one environment or with one parent, yet their behavior will be excellent and they will not need treatment in another environment or with the other parent (625a-628a). L. L.'s mother and her two sisters participated with her in therapy sessions "prior to admission because of family quarrels" (166a).[9] Diagnosed "adolescent adjustment reaction," L. L. was discharged to live with her father in Florida" (168a).

M. W. was transferred to Haverford State Hospital after an overnight stay at another facility for ingestion of valium and possible glue sniffing. "Past psychiatric history included the patient having been placed on probation after a drug abuse charge and a court

[9]"On the day of admission the patient felt as she stated 'closed in' by the mother and she threatened the mother with a kitchen knife. The mother contacted Dr. Aernowitz who recommended hospitalization at Haverford State Hospital" (166a).

evaluation . . . . M ____ has a 1½ year history of underachieving, truancy and drug abuse." (169a). Treated with drugs and psychotherapy, M. W. was at one point placed on leave and "brought back by the police after being questioned due to false accusation of stealing" (171a). During the months of his commitment, M. W. complained that he was being confined involuntarily (170a).

One plaintiff, 15 year old V. M., had run away from home (after a psychiatrist advised her family to let her live away from home) when she was brought to the mental institution by the police "after being picked up in the park in an incoherent, assaultive state along with several young men" (174a). With a background including runaways and drug use, V. M., the hospital stated, "vented much hostility towards her family, particularly her father, 'My family is screwed up. What can I do? I tried running away and it just got me in jail' " (175a).

The hospital found "no evidence of a thought disorder" in V. M. and described her "as a frightened girl, who was attempting to strike out at her surroundings in self defense." (175a). V. M.'s family wanted her outside of the home and the hospital agreed (176a) noting that "it seemed desirable to remove the patient from the family setting because the family had been so rejecting of her and scapegoating her" (177a). If the family could not afford a residential institution, the hospital "recommended that the family take the patient to court to be declared incorrigible" (177a). The family succeeded in their desires; V. M. was



transferred to the Devereaux School, a mental health facility.[10]

Under the protection of a court order forbidding retaliation against them, two juveniles, D. D. and A. M., provided the District Court an uncontradicted description of their experiences (34a-37a).

Prior to his commitment under the challenged statutes, there was conflict at home between D. D. and his parents who, due to their own poor physical and emotional reserve, were thought by the hospital to be "likely unable to cope with the *future* demands" D. D. would make on them. (778a). D. D. was reported to have been truant from school and to have been an uncooperative out-patient.

D. D. was on probation from the juvenile court for truancy. He broke probation but, on recommendation of someone at the county courthouse, D. D.'s parents brought him to the hospital:

> When I got to the hospital, the doctor, Dr. Kratsa, wanted me to go to reform school. My parents kept saying no. They made it sound like if I didn't come here I'd be going to reform school. So I said yes. That's how they tricked me.

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[10]The Devereaux School's protestations to the contrary notwithstanding, see Brief of Devereaux School *amicus curiae*, it clearly does not function as a traditional educational facility. Licensed to provide mental health and mental retardation care, it serves only disabled persons and is subject to the state laws challenged here. See *In Re Sippy*, 97 A.2d 455 (D.C. Mun. App. 1953) (holding that child has right to independent counsel prior to commitment to Devereaux School, "a psychiatric school"). In any case, because Pennsylvania commitment laws apply to all facilities, public and private, and because of the class defendant representing all facility directors, see note 1 *supra*, the issue suggested in the amicus brief is not before the Court.

At the institution, on one occasion, D. D. was restricted because he "didn't do clean-up." For not accepting the restriction, he was sent for five days "up the hill" to a locked building where he was subject to homosexual advances. D. D. also got into trouble at the hospital for possession of phenobarbitol tablets which he—and other juveniles—obtained in the hospital.

A. M. was committed to Haverford State Hospital upon transfer from the University of Pennsylvania Hospital. Age 15, he was depressed and preoccupied with suicide. A. M.'s uncontradicted description of his hospital stay is graphic:

> When I first got here they pushed me into a room and told me to take off my clothes and put on pajamas. Then they took me up to the fifth floor. I wasn't expecting to be locked up. It really drives you crazy. They didn't explain anything to me—they put you up there and that's it. My mother says if she knew that she wouldn't have put me in here. I was up there 3 or 4 days before I was sent to Building 9.
>
> They threaten you here—that's the really bad part. You do what we say or you go up the hill or something—restrictions. Like me and D____ D____ – we'll probably get sent up the hill again cause we didn't go to our half hour of art therapy. D____ got sent up for five days because he wouldn't take his restrictions. They don't care—they don't care about anything. The evening and late night staff stinks. The only staff that really cares is the day staff.
>
> I got transferred to Building 4 one night. I cut myself on purpose. My hands were bleeding and they said I was going for a tetanus shot. They didn't explain what they were doing or tell you they were taking you up. They should at least have told my parents. I would still be there but my doctor, Dr. Kratsa, got me back the next day. If you get sent up on a Friday, and your doctor is only here Tuesday, Wednesday, and Thursday, you'll be there till next Tuesday at least. Do you think you can do anything about the restrictions and us getting sent up the hill? (34a-35a).



*The Class*

The record before the District Court includes information regarding the mental institutionalization of all the thousands of juveniles in Pennsylvania facilities as of May 31, 1973 (310a-316a).[11]

The facts in the following eight numbered paragraphs are stipulated by the defendants:[12]

1. Children have been institutionalized in Pennsylvania mental health facilities for the following reasons as noted by the institution: "Runaway, incorrigible," "Violent episodes," "Hostile, attacked children, attempted to set home on fire," "Robbed gas station," "Stole

[11]This information was provided in response to plaintiffs' interrogatories which were transmitted to all facilities by means of a questionnaire which called for reports of the "reason" or "precipitating behavior" for commitment (27a, 773a). The extensive data are collated and summarized at 210a et seq.

[12]The stipulation and admission of these facts (522a-523a) was preceded by the defendants' objection that additional data from the juveniles' medical records should be before the court (288a). To satisfy this objection, the court and parties agreed that the records of ten randomly selected juveniles could be introduced into evidence (317a - 363a). In the listing in the text, only representative cases are noted with the name of the facility and patient number eliminated. In each case, the words used are, verbatim, the words with which the institutions themselves justified the commitment.

truck, car," "Member of gang which participated in robbery," "Delinquent behavior," "Arson," "Runaway," "Runaway, truancy, delinquent behavior."

2. Mental health facilities sometimes cooperate with parents and relatives "farming out their kindred into mental institutions for motives not always worthy."[13]

3. Children have wound up at institutions for the following reasons, in addition to their being mentally retarded:

> "Interim placement while family was on vacation."[14]
>
> A mother placed her child at Western because "father out of household in the military."
>
> "Hyperactivity interfered with the routine of household and disturbed family members."
>
> Western accepted another child from a mother because of "desertion of father."
>
> In another case, a mother and a father who themselves had emotional difficulties institutionalized their child because they held the "problems of the child . . . responsible for their emotional adjustment."

Also, "Family conflicts," "Family problems, needed separation from the family," "Unmanageable at home, attitude of bold indifference, resents all discipline,

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[13]*Kent v. United States*, 401 F.2d 408, 416, n. 4 (D.C. Cir. 1968) (Burger, J., dissenting).

[14]More than ten months after this "vacation," this individual was reported still at the institution; he was committed on July 20, 1972 for a one to two week expected stay. The facility reported the individual still committed as of May 31, 1973 (355a - 362a, 773a). The defendants incorrectly state that this commitment was part of a state-encouraged respite care program. Brief for Appellants at 48.



compulsive eating," "Runaway, conflict with parents," "Neglect, Social Deprivation," "Neglect, unstable home environment," "Mother has tuberculosis," "Emotional instability of mother," "Hospitalization of mother is apparent reason for admission," "No serious behavior problem; admitted due to parents' inability to provide a satisfactory home environment," "Sometimes hyperactive. Illegitimate," "Illegitimate. Inadequate mother."

4. One facility accepted a young boy because "He has no playmates, planned activities, exercise. Presently he does nothing except sit in school and in front of the T.V. at home."

5. Three juveniles were committed to mental institutions because of physical ailments: ulcerated colitis, a psychosomatic complaint, weight loss.

6. There are five juveniles in one hospital for not going to school.

7. A number of juveniles are committed for drug-related activities. One juvenile for a "fake drug overdose".

In Pennsylvania, 503 juveniles were committed in 1972 under Sections 402 and 403 to twenty-one state institutions for the mentally ill; 130 juveniles entered after a court hearing under Section 406 (315a). That same year, 317 juveniles entered nine state institutions for the retarded under the challenged statutes and 39 were committed upon a Section 406 hearing (314a). A substantial number of juveniles are committed not by their parents but rather by welfare or social agencies (310a-313a).

*District Court Decision*

The District Court determined that "the state is required to provide substantial procedures when there is the possibility of erroneously and wrongfully depriving persons of their liberty by committing them to mental institutions." 402 F. Supp. at 1045 (citations omitted); 793a. The stigma and incarceration associated with mental commitments were found to command the observance of due process. Recognizing that "[i]n deciding to institutionalize their children, parents, as well as guardians ad litem or persons standing in loco parentis, may at times be acting against the interest of their children," the District Court held that parents "may not effectively waive personal constitutional rights of their children." 402 F. Supp. at 1047-1048; 798a.

The District Court held that, before they may be institutionalized, plaintiffs and their class are entitled to a probable cause hearing, a post-commitment hearing, written notice, counsel, and if indigent the right to appointment of free counsel, a finding by clear and convincing proof that they are in need of institutionalization, and other rights. 402 F. Supp. at 1053; 810a-811a.

The court noted that it did not "intend nor expect that all of these procedures will be required every time an attempt to institutionalize a child is made." 811a, n. 26; 402 F. Supp. at 1053, n. 26. With the exception of the rights to notice and counsel, these rights may be waived by the child (or, in some specified circumstances, by counsel) upon approval by the unbiased tribunal. *Id.*



After the opinion in this case issued on July 28, 1975, and while the District Court had under consideration the parties' proposed orders, the Pennsylvania Supreme Court initiated contact with the Federal Court with regard to the necessity of state court involvement in future hearings.[15] The state court did not seek any formal involvement[16] and, in fact, expressed appreciation for the opportunity to be "involved in the drafting of a final Order" in this case.[17] The Pennsylvania Supreme Court indicated that it would provide the hearings contemplated by the proposed order, stating "We are aware that perhaps five thousand hearings or more may have to be conducted within the next several months, and are preparing to shoulder that hearing responsibility with full cooperation to your Honorable Court."[18]

The final order of the Three-Judge Court unanimously granting injunctive and declaratory relief was entered on November 17, 1975 and required the defendants to "refrain from accepting or continuing the admission or commitment" of class members without the opportunity for hearing.

The court also declared that in the interim until "an alternate neutral tribunal" was created by the legislature, the facilities of the state court system should be used to provide due process hearings.

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[15]The full correspondence between the courts is reproduced at the Appendix below.

[16]"We realize that we are not a formal party to these proceedings and that our involvement must therefore be peripheral." Appendix, *infra*, letter of October 15, 1975 from Judge Barbieri to Judge Huyett.

[17]*Id.*

[18]*Op. cit., supra* note 16.

*Revised Statute*

On July 8, 1976, Pennsylvania enacted a statute which affects a small portion of the plaintiff class.[19] About 80% of the class are retarded, Brief for Appellants at 48, n. 42, and the revised law does not affect this group at all; they are still subject to the statute and regulations determined unconstitutional by the District Court. For the remaining 20%, the new law lowers the age for parental commitment from 18 to 14, thus continuing a procedure identical in operation to that dealt with by the court below, which was aware of the legislature's proposals.[20]

## SUMMARY OF ARGUMENT

1. It is undisputed in this case that the state must generally provide substantial due process procedures to protect persons from erroneous commitment to mental institutions. *Baxstrom v. Herold*, 383 U.S. 197 (1966); *Specht v. Patterson*, 386 U.S. 605 (1967); *Humphrey v. Cady*, 405 U.S. 504 (1972). See *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Chaloner v. Sherman*, 242 U.S. 455 (1917); *Minnesota ex rel. Pearson v.*

[19]The relevant portions are reproduced *supra* at 2-5.

[20]The regulations adopted by the state apply to persons 13 and older. See Brief for Appellants at 9-15 and the Dissent, 814a-823a; 402 F.Supp. at 1054-1055. The revised law, like the regulations, also includes a procedure whereby, at some indefinite time after commitment, institutionalization may sometimes be challenged. The legislature's proposal for reducing the age for parental commitment from 18 to 14 is discussed with the District Court at 240a-241a.



*Probate Court of Ramsey County*, 309 U.S. 270 (1940).

2. It is similarly undisputed here that deprivation of a juvenile's liberty by the state for the purpose of treatment and rehabilitation must be accompanied by due process procedures which assure accurate fact-finding. *In re Gault*, 387 U.S. 1 (1967); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

3. The sole disputed question raised on the merits of this case is whether the recognized due process protections apply where the state involuntarily and indeterminately institutionalizes juveniles in mental hospitals upon parental application and without notice, counsel or opportunity for hearing.

4. Confinement in a mental institution deprives persons of their constitutional "right to liberty," *O'Connor v. Donaldson*, 422 U.S. 563 (1975), by placing them in a "total institution" in which every aspect of their lives is regulated by typically impersonal authority. The dangers and potential negative effects of institutional treatment programs are well-known; the process results in what one of the nation's foremost child psychiatrists called, in testimony for the defendants, "an emotional deficiency disease."

5. Institutions are generally underfinanced, understaffed and overcrowded. One study notes that the common practice of moving institutionalized juveniles and staff from one ward to another can be devastating; during a 3½ year period, at least 99 different day staff were on duty with the children being cared for by a total of 246 different adults. The children were each moved at least twice and some as many as eighteen times.

6. Children of differing age and disability are affected in varying ways by the mental health system. Few infants or young children receive specialized services; when disturbances are noted, one professional commentary states, "they are often inaccurately diagnosed." School-age juveniles are more likely to become involved with the mental health system in which they may be placed in one of the residential treatment centers which have sprouted across the country in recent years. The literally dehumanizing effects of these facilities are described in a study written for the federally-supported Project on the Classification of Exceptional Children, created at the prompting of former Secretary of Health, Education and Welfare Elliot L. Richardson:

> A situation of special danger arises, however, from the quality of many residential "treatment centers," which are in reality end-of-the-road custodial placements. Thousands of children have been saved by authentic, intensive residential treatment. Many more thousands have probably been sent to death during life in children's units of large public institutions.

7. Stormy adolescence often results in a loss of control by both parents and children. The conflicts which develop may lead to parental requests for assistance to the state's social sanction systems, juvenile court or mental health. Just as a large proportion of juveniles seen in juvenile court might more appropriately be referred to the mental health system, many young people in mental hospitals would be appropriate candidates for delinquency proceedings. If reform school is the chosen option, the child gets a lawyer and a hearing; the child gets neither if hospitalization is



the choice. "The admission of teenagers to the state hospitals has risen something like 150 percent in the last decade. Instead of being helped, the vast majority are the worse for the experience." These are the conclusions of the Joint Commission on Mental Health of Children, created by Congress in 1965.

8. Despite common stereotypes, it is not simply the degree of intellectual and physical impairment which determines whether a mentally retarded person is institutionalized. Equally crucial are the extent of family disorganization, parental attitudes toward child-rearing and mental retardation, demographic characteristics, availability of community resources and the professional philosophies of those consulted for advice. Parents of retarded persons are driven to seek institutionalization by the state as a means of securing relief from severe physical and emotional burdens and because of a lack of finances and adequate community resources.

9. Across the country, there are thousands of instances in which it is shocking that institutionalization was resorted to or in which it was done not to benefit the child but to benefit the parent or parents. There is little support for a blanket presumption of proper medical or parental action.

10. Many children in institutions are there because of difficulties adjusting to the norms of our society. The psychiatric diagnosis often applied is "adjustment reaction" of infancy, childhood or adolescence; this is attributed to the greater fluidity of all behavior in juveniles and is characterized by such symptoms as overactivity, inattentiveness, shyness, feelings of rejection, overaggressiveness, timidity and delinquency. Difficulty in school, problems with peers, drug use,

hostility and temper tantrums are frequent reasons given for institutionalization of juveniles. The factual allegations supporting such descriptive conclusions are often in dispute and, the way the system of parental commitment operates, there is no available mechanism to resolve such disputes. Many children are committed for "delinquent" non-"insane" behavior, or because parents don't care, or simply because someone didn't know what else to do with them. In a large proportion of cases, it is not even the parent who initiates the "voluntary" commitment process. An overworked social welfare agency, a juvenile court, a relative or others place dozens of juveniles in institutions acting, in the language of the statute, *in loco parentis.*

11. It is clear that some screening process is necessary. Neither parents nor institutions, much less welfare agencies, are presently acting to protect the rights of children in any effective way. It is not possible, in the mental commitment process, for them to act in a conflict-free manner.

12. Most juveniles entering the institutional mental commitment system have never received any psychiatric treatment before, inpatient or outpatient. Once hospitalized, juveniles stay longer than adults; a large proportion of juveniles are not considered by psychiatrists to suffer from any major illness. While adults have benefitted from a national decline in institutionalization, juveniles have not. In 1967, 3% of all persons in state and county mental hospitals were under 18; in 1973, the under-18 group accounted for 4% of the total. The percentage drop in total population was 42% for all ages from 1967 to 1973; for people under 18, the drop was only 12%. The situation is little better for the retarded. Of the nearly 200,000 people in



residential institutions for the retarded, more than 40% are minors. Most of these committed persons could leave the institutions if community services were available.

13. The United States Constitution protects the "primary role of the parents in the upbringing of their children." *Wisconsin v. Yoder,* 406 U.S. 205, 232 (1971). The law presumes that parents generally act in good faith for the benefit of their children and, except in such instances as abuse or neglect, the law will not interfere with the authority of parents to direct the rearing of those for whom they are responsible. The state, as representative of the structure of our society, asserts an interest in maintaining the integrity of the family unit and protecting it against limits on the independence of its functioning. Where parents seek to use their authority in conjunction with the state and its laws to institutionalize a child, the child's right to liberty conflicts with the parent-state right to control the child. Whatever powers parents have, they do not negate the personal constitutional rights – such as the right to liberty – of children. The constitutional guarantees familiar in civil commitment proceedings extend to juveniles.

14. This conclusion is the proper one as this Court, in cases beginning in 1923, has confirmed that the Constitution protects all persons, regardless of age, see *In re Gault,* 387 U.S. 1 (1967), and has impressed a constitutional endorsement upon the proposition that parental authority may be restricted for the benefit of the child. *E.g., Prince v. Massachusetts,* 321 U.S. 158 (1944). The Court has approved limitations on parental powers "if it appears that parental decisions will jeopardize the health or safety of the child, or have a

potential for significant social burdens." *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1971).

15. Most recently, the Court refused to permit parents an "absolute veto" over a child's abortion decision; in such conflict situations, an impartial forum to resolve the dispute might be appropriate. *Planned Parenthood of Central Missouri v. Danforth*, ____ U.S. ____, 44 U.S.L.W. 5197 (July 1, 1976). See also *Bellotti v. Baird*, ____ U.S. ____, 44 U.S.L.W. 5221 (July 1, 1976). Other courts have uniformly agreed that, in the parent-child context, the law must protect the welfare of children, an interest to which the rights of parents must yield. Among the many situations in which parental power has been held properly restricted are juvenile curfews, drinking age laws, sex education, blood transfusions, corporal punishment, visitation, approval of personal injury settlements, organ transplants, sterilization and various monetary matters. The key consideration in all these cases is that society has an interest – independent of parents – in assuring the welfare of children. Parents cannot be permitted any absolute decision-making authority which vitiates their child's constitutional rights or results in a potential for great physical, emotional or social harm to the child.

16. The District Court ordered the defendant state officials to assure that all juveniles presently committed without hearings or counsel under the unconstitutional statutes receive the benefit of "accurate fact-finding," *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971), in a state forum. This was a proper order which did not violate *Preiser v. Rodriguez*, 411 U.S. 475 (1972) or *Wolff v. McDonnell*, 418 U.S. 539 (1973), as the District Court did not order "actual restoration" of liberty to plaintiffs but simply required that proper



state proceedings be afforded persons who never had them. This is identical to the relief upheld by this Court in *Gerstein v. Pugh*, 420 U.S. 103 (1975).

17. There was no requirement in this case that state remedies be exhausted prior to plaintiffs seeking federal relief. Even if there was, there were no state remedies to exhaust as the state habeas corpus statute relied on by appellants, on its face, does not apply to the plaintiff-appellees.

18. Principles of federalism were similarly respected by the District Court. No state proceedings were interfered with; the state executive, judicial and legislative branches are explicitly left free to continue commitment of juveniles, so long as the procedures do not violate the Constitution.

19. The appellants argue that the District Court violated the Eleventh Amendment when it ordered that persons presently incarcerated unconstitutionally be provided state procedures to determine whether they require commitment. The District Court did not award damages or award "equitable restitution" of funds from the state treasury; expenditure of funds to implement the procedural requirements of the decree is incidental to the constitutionally mandated goal of assuring that persons are not erroneously incarcerated. Such impact, held *Edelman v. Jordan*, 405 U.S. 651, 667-668 (1974), is not barred by the Eleventh Amendment. "Equitable restitution" of funds directly to plaintiffs, held in *Eldelman* to resemble monetary damages, is a far cry from requiring compliance with procedural due process.

## ARGUMENT

### I.

### PRIOR TO INVOLUNTARY INDETERMINATE MENTAL INSTITUTIONALIZATION BY THE STATE UPON PARENTAL APPLICATION, JUVENILES ARE ENTITLED TO SUBSTANTIAL PROCEDURAL PROTECTIONS.

#### A. The General Right to Due Process Prior to Mental Institutionalization is Undisputed and Not at Issue in this Case.

The defendants do not dispute that the state must generally provide substantial procedures to protect persons from erroneous commitment to mental institutions:

> There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the state cannot accomplish without due process of law. Specht v. Patterson, 386 U.S., at 608, 18 L.Ed.2d 527, 87 S. Ct. 1428 (1967). Commitment must be justified on the basis of a legitimate state interest, and the reasons for committing a particular individual must be established in an appropriate proceeding.

*O'Connor v. Donaldson*, 422 U.S. 563, 45 L.Ed.2d at 410 (1975) (Chief Justice Burger, concurring). This Court, in recent years, has consistently upheld claims by inmates of mental institutions to hearing and other procedures protective of their constitutional rights. *Baxstrom v. Herold*, 383 U.S. 197 (1966); *Specht v. Patterson*, 386 U.S. 605 (1967); *Jackson v. Indiana*,



406 U.S. 715 (1972); *Humphrey v. Cady*, 405 U.S. 504 (1972); *McNeil v. Director, Patuxent Institution*, 407 U.S. 245 (1972).[21]

This Court's deep concern that due process be afforded to the mentally disabled is by no means newly conceived. Nearly sixty years ago, in *Chaloner v. Sherman*, 242 U.S. 455 (1917), a challenge was made to state mental incompetency procedures. Speaking for a unanimous Court, Justice Brandeis declared:

> As the plaintiff had notice and opportunity to be heard at each stage of the proceedings, the essential elements of due process of law were fully met, and the court had jurisdiction to enter that orcer.

242 U.S. at 455. See also *Dexter v. Hall*, 82 U.S. 9, 25 (1872) ("... a lunatic needs more protection than a

[21] The lower federal courts have uniformly upheld the application of due process to mental commitments, mandating procedures similar or identical to those required by the District Court here. *E. g., Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972). (Three-Judge Court), vacated and remanded on other grounds, 414 U.S. 473 (1974), on remand, 379 F. Supp. 1376 (E.D. Wis. 1974), vacated and remanded on other grounds, 95 S. Ct. 1943 (1975); *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974) (Three-Judge Court); *Bell v. Wayne County*, 386 F. Supp. 1085 (E.D. Mich. 1974) (Three- Judge Court); *Dixon v. Attorney General of the Commonwealth of Pennsylvania*, 325 F. Supp. 966 (M.D. Pa. 1971); *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968); *In Re Ballay*, 482 F.2d 648 (D.C. Cir. 1973); *In Re Basso*, 299 F.2d 933 (D.C. Cir. 1962); *In Re Barnard*, 455 F.2d 1370 (D.C. Cir. 1971); *Sarzen v. Gaughan*, 489 F.2d 1076 (1st Cir. 1973); *Kendall v. True*, 391 F. Supp. 413 (W.D. Ky. 1975) (Three-Judge Court); *Barry v. Hall*, 98 F.2d 222 (D.C. Cir. 1938); *Doremus v. Farrell*, 407 F. Supp. 509 (D. Neb. 1976); *Suzuki v. Quisenberry*, 411 F. Supp. 1113 (D. Hawaii 1976).

minor." "Both such classes of persons are regarded as under the protection of the law.")

In an attack on Minnesota mental commitment procedures, this Court, *per* Chief Justice Hughes, upheld a statute which provided for a hearing, counsel, confrontation, a record and the right to appeal, explaining:

> We fully recognize the danger of a deprivation of due process in proceedings dealing with persons charged with insanity or, as here, with a psychopathic personality as defined in the statute, and the special importance of maintaining the basic interests of liberty in a class of cases where the law though "fair on its face and impartial in appearance" may be open to serious abuses in administration and courts may be imposed upon if the substantial rights of the persons charged are not adequately safeguarded at every stage of the proceedings. But we have no occasion to consider such abuses here, for none have occurred.

*Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270, 276-277 (1940).[22]

In *Specht v. Patterson*, 386 U.S. 605 (1967), the Court rejected the notion that individual rights can be

[22]See *Logan v. Arafeh*, 356 F. Supp. 1265 (D. Conn. 1972), aff'd mem. sub nom. *Briggs v. Arafeh*, 411 U.S. 911 (1973), where the district court upheld a statute noting that a "judicial decision after receiving evidence from a general physician and a psychiatrist in an adversary hearing is fully adequate to safeguard against involuntary commitment through mistake or abuse." 346 F. Supp. at 1270. The timing of the hearings in *Logan* was justified because of a certification that the committed persons were "dangerous." The statutes in the case at bar require only a finding of "in need of care or observation." 50 P.S. 4402, 4403. The recent Mental Health Procedures Act similarly requires a finding of "in need of treatment." Section 201, *supra* at 2.



bypassed by labelling a procedure "civil" rather than "criminal". Discussing mental commitment proceedings under the Colorado Sex Offender Act, the Court held, "These commitment proceedings whether dominated civil or criminal are subject both to the Equal Protection Clause of the Fourteenth Amendment as we held in *Baxstrom v. Herold*, 383 U.S. 107, 86 S. Ct. 750, 15 L.Ed.2d 620, and to the Due Process Clause." *Specht*, 386 U.S. at 608. See *In re Gault*, 387 U.S. 1 (1967).[23]

The due process required in mental commitments today is not unlike that noted by Blackstone in his *Commentaries*. Before a person could be declared retarded ("an idiot"), a writ *de idiota inquirendo* would be filed and "tried by a jury of twelve men;" a declaration that one was mentally ill (a "lunatic") did not occur until after the lord chancellor, "upon petition or information, grants a commission in nature of the

[23]A case strikingly on point is *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968), where a nine year old child was committed to a training school for the feeble-minded and epileptic. While the court recognized that this was a different juvenile situation than in *Gault*, it reasoned:

> But, like *Gault*, and of utmost importance, we have a situation in which the liberty of an individual is at stake, and we think the reasoning in *Gault* emphatically applies. It matters not whether the proceedings be labelled "civil" or "criminal" or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration—whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or treatment and training for a feeble-minded or mental incompetent—which commands of the constitutional safeguards of due process.

396 F.2d at 396.

writ *de idiota inquirendo*, to inquire into the party's state of mind."[24]

The pervasive concern has been that no person may be caused to suffer a loss of liberty—for whatever reason, including possible psychiatric care—without stringent decision-making requirements designed to minimize the ever-present risk of error.[25]

### B. It Is Undisputed In This Case That Juveniles Are Protected By The Due Process Clause Of the Fourteenth Amendment

Over the past quarter century, this Court has developed the thesis that deprivation of a juvenile's liberty for the purpose of treatment and rehabilitation must be accompanied by due process procedures which assure "accurate factfinding." *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971). The defendants do not dispute the correctness of this development.

*Haley v. Ohio*, 332 U.S. 596 (1948), reversed the murder conviction of a 15 year old boy who was arrested at midnight and signed a confession after five hours of police interrogation. The Court held that "Neither man nor child can be allowed to stand

[24]Blackstone, *Commentaries on the Laws of England* 305 (Wendell, ed., 1852). Just as in Pennsylvania and other states, in Blackstone's day, "The legislature, to prevent all abuses incident to such private custody, hath thought proper to interpose its authority, by statute [citation omitted] for regulating private mad-houses." *Id.*

[25]For discussion of the special difficulties of reliance on psychiatric opinion in this context, see 61-65 *infra*.



condemned by methods which flout constitutional requirements of due process of law," 332 U.S. at 601, and noted:

> What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child — an easy victim of the law — is before us, special care in scrutinizing the record must be used.

332 U.S. at 599.

Referring to the unstability and uncertainity of adolescence, the opinion in *Haley* explained:

> He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him.

332 U.S. at 600. See *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962).

The beneficent objectives of juvenile courts provide no justification for arbitrary denial of procedural rights:

> The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment. The State is *parens patriae* rather than prosecuting attorney and judge. But the admonition to function in a "parental" relationship is not an invitation to procedural arbitrariness.

*Kent v. United States*, 383 U.S. 541, 554-555 (1966) (note omitted). *Kent* held in no uncertain terms that juveniles are entitled to vigorous counsel and to hearings in important matters:

> The right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice. Appointment of counsel without affording

> an opportunity for hearing on a "critically important" decision is tantamount to a denial of counsel.

383 U.S. at 561.

In *In re Gault*, 387 U.S. 1 (1967), the Court observed that the purpose of juvenile facilities was for the "child to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive." 387 U.S. at 16. The non-legal benefits of a non-paternalistic procedure were cited by the Court as it referred to certain studies relevant to juveniles with difficulties:

> They suggest that the appearance as well as the actuality of fairness, impartiality and orderliness – in short, the essentials of due process – may be a more impressive and more therapeutic attitude so far as the juvenile is concerned.

387 U.S. at 26.

The reasonable doubt standard was extended to juveniles when *In re Winship*, 397 U.S. 358 (1970), was decided. The Court found, as is urged here, that:

> The same considerations that demand extreme caution in fact finding to protect the innocent adult apply as well to the innocent child.

*Id.* at 365.

The Court went on to hold that it matters not that the purpose of the proceeding is "to save the child" where a possibly lengthy deprivation of liberty is involved. 397 U.S. at 365-366. Concurring, Justice Harlan explained that the need for due process protections resulted from the juvenile's "complete loss of liberty through a state-imposed confinement away from his home, family, and friends," and the stigmatization which was involved. 397 U.S. at 374.



In *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), the Court applied the familiar due process doctrine of "fundamental fairness" and, referring to *Gault* and *Winship*, stated:

> As that standard was applied in those two cases, we have an emphasis on factfinding procedures. The requirements of notice, counsel, confrontation, cross-examination, and standard of proof naturally flowed from this emphasis.

403 U.S. at 543. The result in *McKeiver* is not so much a restriction on juvenile rights as a finding that a jury trial is not "a necessary component of accurate factfinding." *Id.*

### C. The Disputed Issue Before This Court: Does Due Process Apply In Mental Institutionalization of Juveniles by the State Upon Parental Application?

When viewed against the background of the undisputed legal concepts noted above, it would seem evident that a due process hearing is required where the state confines juveniles in mental institutions on application of their parents. This Court has recognized that a "lunacy" action against a juvenile is not barred[26]

[26]In *Francklyn v. Sprague*, 121 U.S. 215 (1887), where a "lunacy proceeding" was brought in court against a juvenile, this Court recognized that such actions were proper:

> In Shelford on Lunacy it is said: "It seems, that a commission of lunacy may issue against an infant; but as the court of chancery has power over infant wards of court and their estates, such a proceeding seems unnecessary during the minority of the ward, except under particular circumstances when the more ample powers given in lunacy may be required for managing their estates." In Stock on Non Compos Mentis, it is also said, that, "infancy is not a ground for withholding a [commission of lunacy], except in so far as it renders such a proceeding unnecessary, by subjecting the infant to another protective power of the Chancellor.

121 U.S. at 229 (brackets in original).

and other courts[27] and commentators[28] have agreed that such proceedings are necessary to protect against

[27]See, *e.g., Saville v. Treadway,* 404 F. Supp. 430 (M.D. Tenn. 1974); *Kidd v. Schmidt,* 399 F. Supp. 301 (E.D. Wis. 1975) held that juvenile mental patients are entitled to preliminary injunction against parental commitment statutes); *J. L. & J. R. v. Parham,* 412 F Supp. 112 (M.D. Ga. 1976), stay granted, ___U.S. ___ 44 U.S.L.W. 3563 (April 5, 1976); *Brown v. Allerton,* Civil Action No. 75-0450-R (filed September 12, 1975) (case dismissed on stipulation that state had amended its statute to provide hearings in juvenile commitments); *In re Long,* 25 N. Ca. App. 702, 214 S.E.2d. 626 (1975).

[28]*E. g.,* Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions,* 62 Cal. L. Rev. 840 (1974); Burt, *Constitutional Rights Of, In, and For Children,* 39 Law and Contemporary Problems 118, 138 (1975):

> These constitutional norms call into question any state program that relies on large-scale, geographically remote, full-time residential institutions for children, even when parents agree to such institutionalization. Constitutional challenges have been mounted, with some success, regarding conditions in these institutions–essentially to establish a "right to treatment" in them. But from the perspective proposed here, the constitutional wrong is not so much the state's failure to deliver promised services as the totality of the state's claim over every aspect of the lives of children in these institutions. These institutions–whether for mentally retarded or seriously emotionally-disturbed or homeless children–are totalitarian, in both the descriptive and the pejorative senses of that word. They are quintessentially the institutions described by Plato and condemned by the Supreme Court in *Meyer:* "the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be."

See Tribe, *Childhood, Suspect Classification, and Conclusive Presumptions,* 39 Law and Contemporary Problems 8, 11 (1975):

> This much, at least, the three puzzles have in common: all seem easiest to solve when the issue clearly involves the

*(continued)*



errors and abuse. What makes this case "difficult and unique"[29] is the involvement and acquiescence of parents in the state-imposed confinement of juveniles.

The sole disputed and important question raised here is whether the recognized Due Process protections apply equally when the State (and parents) seek institutionalization as when the state seeks institutionalization without supportive parental involvement. This is the question raised by the appellants: whether due process applies at all, *not* the extent of due process.

### D. Institutionalization Results in Severe Deprivation of Liberty, Other Dangers, Social Stigma, Self-Stigmatization and Discrimination.

Institutional commitment to a mental institution deprives persons of their "right to liberty," *O'Connor v. Donaldson,* 422 U.S. 563 (1975), by placing them in a "total institution" in which every aspect of their lives is regulated by impersonal authority.[30]

*(footnote continued from preceding page)*

> exercise of a right we have come to regard as constitutionally "fundamental," such as the right to bodily liberty or the right to be heard in one's own defense. Childhood need not be destroyed, dissolved, or ignored in order to recognize that when such a right is at stake, the general fact of youth *alone* cannot automatically justify the right's abridgement. (emphasis in original)

[29]District Court Opinion, 796a; 402 F. Supp. at 1047.

[30]Goffman, *Asylums* (1961). As early as 1938, a federal appellate court recognized the similarities between the situation of a patient and that of a prison inmate. *Barry v. Hall,* 98 F.2d 222 (D.C. Cir. 1938). A detailed comparison of the conditions in a psychiatric treatment center and a state prison–demonstrating the restrictiveness of the mental institution–is provided in "Brief

*(continued)*

The dangers and potential negative effects of institutional treatment programs are well-known;[31] the process results in what one of the defendants' own witnesses calls "an emotional deficiency disease" (715a). Children classified both "retarded" and "mentally ill" are subjected – in differing ways – to these dangers.

### 1. Children in the Mental Health System.

While adults have benefitted from a national decline in institutionalization, juveniles have not. In 1967, 3%

*(footnote continued from preceding page)*
of Donald McEwan, Pro Se" in Katz, Goldstein & Dershowitz, *Psychoanalysis, Psychiatry and the Law* 700-702 (1967). See *In re Gault*, 387 U.S. 1, 27 (1967). For further discussion of the nature of mental treatment in the United States, both today and in the past, see *Developments in the Law–Civil Commitment of the Mentally Ill*, 87 Harv. L. Rev. 1190, 1316-1376 (1974); Deutsch, *The Mentally Ill in America* (2d ed. 1949); Grob, *Mental Institutions in America: Social Policy to 1875* (1973); Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (1971); Kittrie, *The Right to Be Different: Deviance and Enforced Therapy* (1971). See also Ellis, *Volunteering Children, supra* note 28, 62 Cal. L. Rev. at 841-844.

[31]Barton, *Institutional Neurosis*, (2d Ed. 1966); Belknap, *Human Problems of State Mental Hospitals* (1956); Gralnick, et al., "Mental Patients in Transition" in Greenblatt (Ed.), *Mental Patients in Transition*, (1961); Schwartz, "Rehabilitation of Mental Hospital Patients," *Public Health Monograph*, No. 17 (1953); Stanton and Schwartz, *The Mental Hospital* (1954); Wing and Brown, *Institutionalization and Schizophrenia*, (1970); Vail, *Dehumanization and the Institutional Career*, (1966). The trial testimony herein describes some of the harmful effects of institutionalization. See testimony of Dr. Ingall at 596a; Dr. Feiner at 474a - 475a.



of the 426, 309 persons in state and county mental hospitals were under 18. In 1973, the under 18 group accounted for 4% of the 248,518 total. The percentage drop in total patient population was 42% for all ages from 1967 to 1973; for people under 18, the drop was only 12%. Dept. of Health Education and Welfare, NIMH, *Statistical Note 113, State Trends in Resident Patients – State and County Mental Hospital Inpatient Services 1967-1973*, Tables 2, 2a and 4.

Most juveniles entering the institutional mental health system have never received any psychiatric treatment before, stay longer than adults,[32] and a large proportion do not suffer from any major "illness."[33] While about a third of juvenile commitments are pursuant to an involuntary civil commitment, 14% appear to be admitted under the procedures challenged here;[34] more

[32]Most juveniles admitted to mental hospitals (53% in 1969) never before received psychiatric treatment; the figure for all age admissions is only 38.7%. Dept. of Health, Education and Welfare, NIMH, Statistical Note 90, *Utilization of Psychiatric Facilities by Persons Under 18 Years of Age, United States 1971*, Table 9. Once in a public or private mental hospital, juveniles stay longer than adults. *Id.* at Table 8.

[33]In 1972, the leading primary diagnosis of juveniles admitted to state and county mental hospitals was "transient situational disorders and behavior disorders of childhood and adolescence." 38% of the 24,677 admissions received this diagnosis. Dept. of Health, Education and Welfare, NIMH, *Statistical Note 111; Age, Sex, and Color Variations in the Diagnostic Distribution of Admissions to Inpatient Services of State and County Mental Hospitals, United States 1972*, Tables 1a and 1b.

[34]Nationally, 14% of mental hospitals admissions of persons under 18 are applied for by another person on the minor's behalf; 33.4% of the juveniles are admitted by means of an involuntary civil commitment. Dept. of Health, Education and Welfare, NIMH, *Statistical Note 105: Legal Status of Inpatient Admissions to State and County Mental Hospitals, United States 1972*, Table 1b.

non-white juveniles than whites are confined without the benefit of a civil commitment.[35]

Few infants or young children are seen in the mental health system; few specialized services exist for this age range.[36] A major problem in the mental health diagnosis of very young children is that "When disturbances are noted, they are often inaccurately diagnosed."[37]

School-age juveniles are more likely to become involved with the mental health system in which they may be placed in one of the residential treatment centers which have sprouted across the country in recent years.[38] The literally devastating effects of these facilities are described in a study written for the Project on the Classification of Exceptional Children, created at the prompting of then Secretary of Health, Education and Welfare Elliot Richardson:

[35]While 38.2% of white juveniles are admitted under involuntary civil commitments, only 19% of non-white juveniles are. White juveniles signed in by another acting in their behalf are 11.7% of admissions while the percentage for non-whites is 20.8%. *Statistical Note 105, supra* note 34, at Table 1b.

[36]Cohen, et al., *Mental Health Services,* in Hobbs (ed.), *Issues in the Classification of Children,* Vol. I, 88, 91 - 98 ( 1975).

[37]*Id.* at 97.

[38]Residential treatment centers (RTC's) provide inpatient (residential) psychiatric services for persons under 18 years diagnosed as emotionally disturbed. Some retarded children may also be served. "As of January 1974, there were 340 RTC's in the United States which maintained a total of more than 19,000 beds . . . ." Dept. of Health, Education and Welfare, NIMH, Statistical Note 130, *Residential Treatment Centers for Emotionally Disturbed Children 1973 - 74* at 2. "The nearly 30,000 children under care in RTC's during 1973 received over 6.3 million days of care." *Id.* at 3.



> A situation of special danger arises, however, from the quality of many residential "treatment centers," which are in reality end-of-the-road custodial placements. Thousands of children have been saved by authentic, intensive residential treatment. Many more thousands have probably been sent to death during life in children's units of large public institutions. For example, in custodial mental hospitals, children with severe developmental disabilities such as childhood autism often have a rapid downhill course marked by increasing isolation, disorganization, and deterioration. Separated from parents and familiar surroundings, these children lose their liveliness and apparent intelligence and succumb to the regimentation and trauma and lack of care and education. As another example, children with borderline personalities and borderline intelligence are often placed in residential centers because of their aggressive or antisocial behavior at home. With punitive treatment, peer socialization into deviance, lack of education, and the absence of incentives toward normal development in many residential institutions, such children often become incapable of ever fully resuming a healthy social role.[39]

Stormy adolescence often results in a loss of control by both parents and children.[40] The conflicts which develop[41] may result in parental requests for assistance to the state's social sanction systems, juvenile court or

[39]*Op. cit., supra,* note 36 at 106.

[40]See Meeks, *The Fragile Alliance* (1971).

[41]The defendants' own witnesses spoke most directly of these conflicts: Testimony of Dr. Tashjian at 651a-652a, 656a-657a, 668a-669a; Dr. Masterson at 727a-728a ("every parent of every patient we see can be called unstable"), 732a-734a; Dr. Miller at 785a ("conflict of interests").

mental health. Just as a large percentage of juveniles seen in juvenile court might more appropriately be referred to the mental health system,[42] many young people in mental hospitals would be appropriate candidates for delinquency proceedings.[43]

The Joint Commission on Mental Health of Children described the failure of hospitalization for adolescents:

> The admission of teenagers to the state hospitals has risen something like 150 percent in the last decade . . . . Instead of being helped, the vast majority are the worse for the experience. The usual picture is one of untrained people working within the framework of long-abandoned theory (where there is any consistent theory), attempting to deal with a wide variety of seriously sick

[42]Lewis, Balla, *et al., Psychotic Symptomatology in a Juvenile Court Clinic Population,* 12 Journal of the American Academy of Child Psychiatry 660 (1973).

[43]The record herein provides numerous examples. See pages 8-16 *supra* for descriptions of the delinquent or criminal bases for juvenile mental commitments as well as the familiar "status offenses" such as truancy and incorrigibility. The mental commitments described took place for both the retarded and for the mentally ill under the challenged statutes. One study of adolescents admitted to inpatient psychiatric services over three years demonstrated that–for the two groups into which the admissions could be divided, nondelinquent and delinquent–the first group's admission to the hospital was judged appropriate. The delinquent group was judged inappropriately hospitalized and not "requiring or benefiting from psychiatric intervention, at least in an inpatient hospital setting." Weiss & Pizer, *Hospitalizing the Young: Is it for their Own Good?* 54 Mental Hygiene 498 (1970), citing the study, Miller & Kenney, *Adolescent Delinquency and the Myth of Hospital Treatment,* 12 Crime and Delinquency 38 (1966).



> youngsters and producing results . . . measured by a recidivism rate that is often 30 to 50 percent, and occasionally higher.
>
> What we have, in effect, is a state of quiet emergency, unheralded and unsung, silently building up its rate of failure and disability and seemingly allowed to go its way with an absolute minimum of attention from the public, and legislators, or the clinical professionals.[44]

### 2. The Mentally Retarded Child

Most mentally retarded persons are not confined to institutions for the retarded; about 75 percent are not in institutions at all.[45] It is estimated that more than 200,000 persons, 10 percent of all the retarded, are in institutions for the retarded.[46] Of these, 42 percent are

[44]Joint Commission on Mental Health of Children, *Crisis in Child Mental Health - Challenge for the 1970's* 6 (1970), as quoted in Hobbs, *The Futures of Children* 131 (1975). The Joint Commission on Mental Health of Children was established by the U. S. Department of Health, Education and Welfare pursuant to Social Security Amendments, July 30, 1965, Pub. L. No. 89-97, §231(a)-(d), 79 Stat., 360. It was composed of "representatives of leading national, medical, welfare, educational, and other professional associations, organizations, and agencies active in the field of mental health of children." *Id.* at §213(c).

[45]Edgerton, *et. al., Mental Retardation System,* in Hobbs, ed., *Issues in the Classification of Children,* Vol. II, 63-64 (1975).

[46]U.S. Department of Health, Education and Welfare, *Mental Retardation Sourcebook* (1972). In 1974, it was estimated that the total number of residents of public residential facilities was approximately 176,000. National Association of Superintendents of Public Residential Facilities for the Mentally Retarded, *Current Trends and Status of Public Residential Services for the Mentally Retarded: 1974* 13 (1975) (hereafter cited "Current Trends"). This source provides estimates based on a national survey of facilities.

aged between 3 and 21 years and 3% are under 2.[47]

While degree of intellectual and physical impairment is a factor in determining institutionalization of retarded individuals, it clearly does not stand alone nor is it necessarily the most important. Other factors are the degree of family disorganization, demographic characteristics, parental attitudes toward childrearing and mental retardation, availability of community resources, and the professional philosophies of those consulted for advice.[48] "Professional philosophies influence decisions because patient oriented clinicians are more likely to give first priority to factors they consider advantageous to the child, whereas family oriented clinicians are more likely to base their recommendations on those which they assume to be best for the family."[49]

The record in this case vividly illustrates how the retarded often find themselves in institutions through fortuitous and avoidable circumstances. For example, one institution explained a commitment in this way:

> Since maternal grandparents have come to live with the family, this has presented serious problems. The maternal grandmother needs constant care but the maternal grandfather has been unable to help and acts as if he hates everyone.

[47]Current Trends, *supra* note 46, at 7.

[48]*E.g.*, Eyman, *et al.*, *Factors Determining Residential Placement of Mentally Retarded Children*, 76 Amer. J. of Mental Deficiency 693 (1966); Gralicker, *et al.*, *A Study of Factors Influencing Placement of Retarded Children in a State Residential Institution*, 69 Amer. J. of Mental Deficiency 553 (1965).

[49]Eyman, *supra*, note 48, at 697.



> The older sister, _____, has also had problems in adjusting to the situation. Mother was said to be close to a nervous breakdown and could no longer cope with both _____ and the maternal grandmother (351a).

Here, no commitment was even contemplated until two grandparents added to the burden of caring for a retarded child. It is no wonder that the mother was close to a breakdown and also no wonder that the helpless child was institutionalized rather than the grandparents who would have been entitled to a lawyer and a hearing for their protection.

Another case:

> The father described her as hyperactive, but the mother said that she was only active. Though the parents stated that she was well accepted at home, they felt that now that she is entering pubescence, it will be better for her to be admitted at this time. The maternal aunt who had been caring for her was away and since she was the one against placement, the parents felt that this was the time to arrange for placement. The brothers, though they love _____, are uncomfortable in her presence (353a).

Thus, in order to avoid providing their child with birth control, and in order to evade a responsible relative who opposed the child's commitment, the hospital and parents chose to confine their child in an institution.

Parents of retarded persons often resort to seeking institutionalization by the state as a means of securing relief from severe physical and emotional strains and

because of a lack of finances and adequate community resources:[50]

> However, if these parents are "given honest information about residential and community alternatives and time to reflect," most of them "come to realize that the placement in most institutions means placing a lid on the child's potential by consigning him to custodial care – sometimes humane but often inhumane by anyone's standards. Most good residential schools (offering education and training as well as care) are extremely expensive. Most state institutions are still little more than warehouses which 'store' people."[51]

The particular dangers of institutionalization for the retarded include a high rate of mortality (generally higher, especially for the young, than in the community), an adverse effect on intelligence and an abnormally high prevalence of personality disorders.[52]

After the emergence of the first institutions for the retarded in the United States 120 years ago in an

[50]See, *e.g.*, Justice, *et al.*, *Problems Reported by Parents of Mentally Retarded Children - Who Helps?*, 75 Amer. J. of Mental Deficiency 685 (1971). Lack of community services was the reason for 50 percent of readmissions to institutions for the retarded in 1973-1974. *Current Trends, supra,* note 46, at 20. "Community rejection" was found to be the cause for 22 percent of such readmissions. *Id.* If appropriate community services were available, 52 percent of the retarded in institutions could leave according to superintendents' own estimates. The percentages are higher for the borderline (98%), mild (86%) and moderate (81%) levels of retardation. *Current Trends,* supra, at 23.

[51]Hobbs, *The Futures of Children* 142 (1975) (citation omitted).

[52]Studies discussed in Edgerton, *et al., supra,* note 45.



atmosphere of optimism, the facilities failed to fulfill their expectations for cure or rehabilitation. By 1880, the earlier prevention model was succeeded by a "pity model" which supported the provision of custodial care. By the turn of the century and with the development of the eugenics movement,[53] a societal image of the retarded as a danger and a menace to society become fixed.[54] As one commentator notes:

> . . . many of our institutions, to this very day, operate in the spirit of 1925 when inexpensive segregation of the scarcely human retardate was seen as the only feasible alternative to combat a social menace. I am not proposing that this view is still held; I am proposing that most institutions function as *if this* view were still held.[55]

This brief exposition demonstrates the invalidity of the defendants' view that the institutionalized retarded should somehow be treated differently from the mentally ill.[56]

[53]See *Buck v. Bell,* 274 U.S. 200 (1927), upholding a statute growing out of this movement.

[54]For an analysis of this historical development, see Baumeister, *The American Residential Institution: Its History and Character* in Baumeister and Butterfield, eds., *Residential Facilities for the Mentally Retarded* (1970); Kugel & Wolfensberger, eds., *Changing Patterns in Residential Services for the Mentally Retarded* (1969).

[55]Wolfensberger, *The Origin and Nature of Our Institutional Models,* in Kugel and Wolfensberger, *supra,* note 54, at 129 (emphasis in original).

[56]Brief for Appellants at 48. The defendants state that in Pennsylvania, "approximately eighty percent of institutionalized juveniles are mentally retarded." *Id.* Note that the new statute does not apply at all to this portion of the plaintiff class. See Section 502, at 5 *supra.*

### 3. Institutional Life

Institutions are generally underfinanced, understaffed, and overcrowded.[57] One study notes that the practice of moving institutionalized juveniles and staff from one unit to another can be devastating; during a 3½ year period, at least 99 different day staff were on duty with the children being cared for by a total of 246 different adults. The children were moved at least twice and some as many as 18 times.[58]

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[57]Hobbs, *supra,* note 51, at 127-128. Provost Nicholas Hobbs notes in his report:

> Most public institutions are grossly and chronically underfinanced (Kugel, 1969). During 1966 and 1967 the per diem costs in United States institutions (except in Alaska) ranged from about $3 to $12 per person (U.S. Department of Health, Education, and Welfare, 1968). In stark contrast, five of the largest United States zoos were spending, in a comparable period, an average of over $7 for their large animals (Kugel, 1969, p. 3). Further, in 1966, general hospital care cost more than $40 per day (Butterfield, 1969, p. 18).
>
> * * *
>
> Overcrowding is commonplace. Many residential facilities have as many as 25 to 50 percent more residents than they were intended to serve. Buildings that are old and poorly designed also create problems. For instance, lavatory and toilet facilities are often poorly maintained and may even be nonfunctioning. Ancient facilities may make it difficult if not impossible to prepare food in a sanitary fashion; and climate control may be so inadequate as to leave buildings either too hot or too cold (Kugel, 1969, pp. 405; Blatt and Kaplan, 1967). Equally inadequate are modern complexes of steel, chrome, and glass, when human caring is absent.

[58]Tizard, *The Role of Social Institutions in the Causation, Prevention and Alleviation of Mental Retardation,* in Haywood, *Social-Cultural Aspects of Mental Retardation* (1970). See *In re Gault,* 387 U.S. 1 (1967).



Nicholas Hobbs, in his report volume of the HEW-sponsored Project on Classification of Exceptional Children, describes how the process of institutionalization can "make children sick:"

> Go to a big state mental hospital in almost any state and ask to visit the children's ward. If you are allowed to visit, you will find people, children and staff alike, caught up in a no-exit game. Patients and staff play their roles, each defined by the other, both prescribed by elaborate regulations and procedures that serve one purpose: to maintain the stability of the institution. Most of these institutions are so large, so unwieldy, so antiquated in design, so poorly staffed, so burdened with the miseries of man that everyone involved must devote most of his energies to maintaining a steady-state situation. The metaphor of illness rules. Change in or deviation from role requirements cannot be tolerated. Apathy goes unnoticed. Precise adherence to role expectation is praised and rewarded, while deviations and serious efforts to change the system are punished. In such a setting, hospitals can indeed make children sick.[59]

As the discussion above indicates,[60] institutionalization is an extreme deprivation of liberty for both the retarded and the mentally ill. It is typically dehumanizing and often dangerous. The consequences of a mistaken commitment of a child are enormous. As the District Court noted, "Neither the state nor plaintiffs have an interest in committing to mental institutions children not in need of institutionalization." 402 F. Supp. at 1050; 803a.

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[59] Hobbs, *supra* note 51, at 130.

[60]See pages 35-47 *supra.*

### 4. Stigma and Discrimination

Severe social stigma, self-stigmatization, job and license discrimination also result from the experience of commitment to a mental institution.[61] This is no less a probelm simply because a parent volunteered the child; parental commitment requires a certification of the juvenile as mentally disabled just as does an administrative or judicial commitment. It is the fact of institutionalization, rather than the manner, which stigmatizes.[62]

The "stigma associated with civil commitment" found by the District Court, 795a; 402 F. Supp. at 1046, affects both the mentally ill[63] and the retarded.[64]

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[61] See Testimony of Dr. Kandler at 574a-575a and Dr. Messinger at 622a. See also *Lessard v. Schmidt, infra* note 63.

[62] "Unfortunately, there is a stigma being attached to being in a hospital, which would be another reason why all care ought to be taken before this type of drastic step be taken. I never heard the fact that a judge or attorney being involved in a proceeding increases that stigma." Testimony of Dr. Kandler at 574a-575a.

[63] *E.g., In re Ballay,* 482 F.2d 648, 668 (D.C. Cir. 1973); *Lessard v. Schmidt,* 349 F. Supp. 1078 (E.D. Wis. 1972), vacated and remanded, 414 U.S. 473 (1974), on remand, 379 F. Supp. 1376 (E.D. Wis. 1974), vacated and remanded 95 S. Ct. 1943 (1975); Braginsky, *et al., Methods of Madness: The Mental Hospital as a Last Resort* (1969). See Testimony of Dr. Ingall at 596a and Dr. Miller at 705a.

[64] *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania,* 343 F. Supp. 279, 293-295 (E.D. Pa. 1972); Edgerton, *The Cloak of Competence: Stigma in the Lives of the Mentally Retarded* (1967); Braginsky & Braginsky, *Hansels and Gretels: Studies of Children in Institutions for the "Mentally Retarded"* (1971). The defendants' assertion in their brief that the mentally retarded are somewhat insulated from stigma is totally without foundation.



The Due Process Clause protects the plaintiffs here because the injury to their standing and reputation does not stand alone but is associated with the deprivation of liberty and other harms which flow from mental commitment. See *Wisconsin v. Constantineau,* 400 U.S. 433 (1971). *Cf. Paul v. Davis,* ____ U.S. ____, 44 U.S.L.W. 4337 (1976).

## E. Parental Powers Are Limited for the Protection of Children.

Under Pennsylvania law, while a parent or guardian on behalf of a juvenile may apply for commitment, only the institutional representative can commit.[65] Counsel for defendants has emphasized that, regardless of the parents' wishes, "the institution still will have the ultimate say in whether or not that child is institutionalized based upon their independent determination – psychiatric determination" (243a).

The defendants argue that this involvement of parents or guardians is sufficient ground to negate the otherwise conceded right of juveniles to due process in mental commitment proceedings. The parental powers authorized by law are so encompassing, it is argued, that the juveniles' rights must yield. The rationale of numerous decisions of this Court indicates otherwise.

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[65] A significant number of juvenile commitments are initiated not by their parents but rather by social welfare agencies, relatives or courts (310a-313a). The recent statute still permits such parental involvement with state commitment. As the defendants' counsel told the District Court, under the revision, "under age 14, he would again be admitted or committed by his parent or the person standing in locus parentis" (241a).

In cases beginning in 1923, this Court has examined the extent to which the Constitution affects the rights of children and the triangular relationship of parent-child-state. The Court has confirmed that the Constitution protects all persons, regardless of age, and has impressed a constitutional endorsement upon the proposition that parental authority may be restricted for the benefit of the child.

*Meyer v. Nebraska*, 262 U.S. 390 (1923), involved what the Court later called "children's rights to receive teaching in languages other than the nation's common tongue." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). In *Meyer*, a state law restricting the use of foreign languages in schools was struck down and the Court declared the familiar principle that state interests must often yield to individual rights:

> That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected.

262 U.S. at 401.

Two years later, when a criminal law requiring parents to send children to public schools was challenged, it was only after noting the contention that the law violated "the right of the child to influence the parents' choice of a school," *Pierce v. Society of Sisters*, 268 U.S. 510, 532 (1925), that the familiar gloss was made that the law

> unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.

*Id.* at 534-535.



However, the possible breadth of this language in *Pierce* was substantially limited in *Prince v. Massachusetts*, 321 U.S. 158 (1944), when the Court upheld restrictions on the rights of guardians and supported certain regulation of family interests:

> But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. [citations omitted] And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well-being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways.

*Id.* at 166 (notes omitted). Thus, in upholding a child labor law against the Jehovah's Witness guardian of a nine year-old girl, the Court in *Prince* expressed the very interest that plaintiffs herein seek recognition of:

> It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens.

321 U.S. at 165.[66]

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[66]The case of *Ginsberg v. New York*, 390 U.S. 629 (1968), upholding the constitutionality of a New York criminal obscenity law prohibiting the sale to minors under 17 of material obscene to minors, is not contrary authority. First, *Ginsberg* dealt with obscenity which is *not* constitutionally protected; the liberty of the juveniles in the case at the bar, on the other hand, *is* subject to constitutional protection. Second, the Court recognized the narrowness of the issue before it when it declared that it was not considering

> the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the State, cf. In re Gault, 387 U.S. 1, 13.

*(continued)*

In *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506-507 (1969), young persons were held protected by the First Amendment in their school protest against the Vietnam War. The Court declared:

> Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.

393 U.S. at 511.

*Wisconsin v. Yoder*, 406 U.S. 205 (1971), held that Amish parents could not constitutionally be convicted of violating a compulsory school attendance law when children 14 and 15 years old did not attend until age 16 as the law required. Although indirectly supporting parental interests in the upbringing of children, the Court specifically did not reach the question of what would happen if the state and parents were aligned against the child. 406 U.S. at 231-232 (opinion by Chief Justice Burger) and 406 U.S. at 237 (Justice Stewart, with Justice Brennan concurring). Limitations on parental powers continued to receive approval; such regulation is proper

> if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.

406 U.S. at 234.

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*(footnote continued from preceding page)*
390 U.S. at 630. Third, the Court held only that the Constitution supports the parental "claim to authority *in their own household*" to direct the rearing of children, 390 U.S. at 639 (emphasis added); this cannot be read as authority for absolute discretion outside the household and, indeed, the Court held that the state must protect children from abuses, 390 U.S. at 640.



The extent of control over juveniles granted by the law to parents and guardians is broad enough to provide appropriate deference to the "importance of the family," *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), in our society, but narrow enough to protect the independent personal interests of the most powerless of the family's members.[67]

In the recent abortion decisions, parental "absolute power" to overrule an abortion decision was found improper where the juvenile and parent "are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure." *Planned Parenthood of Central Missouri v. Danforth*, ____ U.S. ____, 44 U.S.L.W. 5197, 5204 (July 1, 1976). The state's interest in safeguarding the family unit and parental authority do not outweigh the rights of the juvenile. *Id.* It is the "absolute limitation on the minor's right," *Id.*, 44 U.S.L.W. at 5208 (Concurring opinion of J. Stewart, with J. Powell), with no provision for "judicial resolution of any disagreement," *Id.*, which causes the greatest risk of harm to the juvenile and involves the least benefit to legitimate state interests. See *Bellotti v. Baird*, ____ U.S. ____, 44 U.S.L.W. 5221 (July 1, 1976).

While the above cases may be seen as supporting a presumption in favor of parental prerogatives,[68] this

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[67]Dr. Joel S. Feiner testified that " . . . the child has some intrinsic vulnerability based upon the fact the child is dependent to begin with, the child is more controllable in certain ways, the child is also often a newcomer to the setting, the last to be present in this little system . . ." (472a).

[68]See generally Burt, *Developing Constitutional Rights Of, In and For Children*, 39 Law and Contemporary Problems 118 (1975). In none of the cited cases except *Bellotti* and *Danforth* was there any indication that the parents' and children's views were in conflict or that the state was acting with the parent in ways that might be detrimental to the child.

presumption is overcome where the state acts with parents to impose serious deprivations upon juveniles. As our law has developed, despite legitimate hesitation,[69] society's interest in the protection of children has necessitated narrowly-drawn limitations on the individual interests of parents.[70]

Other courts have uniformly agreed that, in the parent-child context, the law as *parens patriae* must protect the welfare of children, an interest to which the

[69]"Tenderness of the individual interests of parents, since legal interference in family relations touches individuals in a particularly sensitive spot, has induced hesitation in changing the established rules, even where reasons for change were evident." Pound, *Individual Interests in the Domestic Relations*, 14 Mich. L. Rev. 177, 187 (1916) (note omitted).

[70]In 1916, Roscoe Pound described the historical process referred to:

> Mere statement of the claims which parents may make with respect to or against children makes it evident that certain other interests must be weighed against these individual interests of parents. Under more primitive social conditions the group interests of the family or kindred largely dictated the legal delimitation of parental and filial interests. In modern times the individual interests of the child came to be given greater weight. Today certain social interests are chiefly regarded. These are on the one hand a social interest in the maintenance of the family as a social institution and on the other hand a social interest in the protection of dependent persons, in securing to all individuals a moral and social life and in the rearing and training of sound and well-bred citizens for the future. The parent's claim to custody of the child and to control over its bringing up has come to be greatly limited in order to secure these interests.

*Id.* at 182 (note omitted).



rights of parents must yield.[71] Among the many situations in which parental "rights" and "powers" have been held properly restricted are juvenile curfews,[72] drinking age laws,[73] sex education,[74] blood transfusions,[75] corporal punishment,[76] visitation,[77] approval of personal injury settlements,[78] abortion,[79] organ

[71]The issue arises most often in custody cases. *E.g.*, *Holtsclaw v. Mercer*, 145 F.2d 388 (D.C. Cir. 1944); *Langan v. Langan*, 150 F.2d 979 (D.C. Cir. 1945); *Bartlett v. Bartlett*, 221 F.2d 508 (D.C. Cir. 1954). See *In re Stuart*, 114 F.2d 825 (D.C. Cir. 1940) (right of parents to control upbringing of children not absolute); *Newton v. Burgin*, 363 F. Supp. 782 (W.D. N. Ca. 1973) (Three-Judge Court), *aff'd.*, 414 U.S. 1139 (1974) (parental constitutional right to control children can be limited by statute).

[72]*Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242 (M.D. Pa. 1975).

[73]*Republican College Council of Pennsylvania v. Winner*, 357 F. Supp. 739 (E.D. Pa. 1973) (Three- Judge Court).

[74]*Cornwell v. State Board of Education*, 314 F. Supp. 340 (D.Md. 1969), *aff'd.*, 428 F.2d 471 (8th Cir. 1970), *cert. den.* 400 U.S. 942 (1970).

[75]*People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769 (1952), *cert. den.*, 344 U.S. 824 (1952); *State v. Perricone*, 37 N.J. 463, 181A.2d 751 (1962), *cert. den.*, 371 U.S. 890 (1962).

[76]*Ware v. Estes*, 328 F. Supp. 657 (N.D. Tex. 1971), *aff'd.*, 458 F.2d 1360 (5th Cir. 1972), *cert. den.*, 409 U.S. 1027 (1972).

[77]*Comm. ex rel. Heston v. Heston*, 98 A.2d 477, 173 Pa. Super. 260 (1953); *Surrey v. Surrey*, 144 A.2d 421 (D.C. Mun. App. 1958).

[78]*Rafferty v. Rainey*, 292 F. Supp. 152 (E.D. Tenn. 1968).

[79]*In re Smith*, 295 A.2d 238, 16 Md. App. 209 (1972) (mother cannot compel daughter to submit to abortion).

transplants,[80] sterilization,[81] and monetary matters.[82] The key consideration in all these cases is that society has an interest – independent of parents – in assuring the welfare of children. Where the state is involved and there is a potential for conflict in the interests of parents and children, the law provides independent representation for the child.[83]

When viewed in terms of its nature and potential for harm, application for mental institutionalization of a child (whether the commitment is erroneous or not) is an event at an extreme end of the continuum of decisions made by a parent or guardian.[84] The pressured

[80] *Hart v. Brown*, 289 A.2d 385, 29 Conn. Sup. 368 (1972).

[81] *Frazier v. Levi*, 440 S.W.2d 393, 394 (Civil App. Tex. 1969).

[82] *Ellis v. Massenburg*, 126 N.C. 129, 35 S.E. 240 (1900) (action to set aside deed); *White v. Osborne*, 251 N.C. 56, 110 S.E.2d 449 (1959); *Babcock v. Fisk*, 327 Mich. 72 (1950) (control of publicly raised funds).

[83] See, *e.g.*, cases cited at notes 71-82 *supra*. One authority has observed that parents, the state and childcare agencies do not have a "conflict-free interest in representing the child." Goldstein, Freud & Solnit, *Beyond the Best Interests of the Child* 66 (1973).

This Court has had frequent experience with cases in which the property rights of minors have been protected by representation independent of the guardian. *Insurance Company v. Bangs*, 103 U.S. 435 (1880); *United States v. Dunn*, 268 U.S. 121 (1925); *Clarke v. Clarke*, 178 U.S. 186, 193-195 (1900). See also *United States v. Equitable Trust Company of New York*, 283 U.S. 738 (1931) (in lower courts, one court-appointed guardian acted to protect mentally incompetent person from actions of wife and another court-appointed guardian).

[84] But see *Respublica v. Keppele*, 2 U.S. 197 (1793) (Pa. Sup. Ct.), for a more extreme situation, holding that a parent could not bind a child as a servant.



context in which such a decision is made and the tremendous implications of such a decision combine to make imperative strict limits on any exercise of "absolute power" by any authority.

The expert witnesses for all parties agreed that families seeking commitment of allegedly handicapped children are characterized by severe stress, disharmony and dislocation.[85] The problems of children are a function of intrafamilial problems and exist in the context of a weakened family structure with conflict overtly expressed.[86] The juvenile behavior which precipitates institutionalization may be provoked by the parents; there are also many cases where the child may be driven to such behavior by the conflicts at home.[87]

[85] See Testimony of Dr. Kandler at 543a, 553a-554a, 570a-571a; Dr. Ingall at 588a-590a (intrafamilial conflict; child as scapegoat), 601a; Dr. Messinger at 616a-619a; Dr. Tashjian at 651a-652a, 656a-657a; Dr. Masterson at 727a-728a, 733a-734a. *E.g.*, Alanen, *The Family in the Pathogenesis of Schizophrenia and Neurotic Disorders*, 24 Acta Psychiatrica et Neurologica Scandinavica, Suppl. 189 (1966); Lidz, *et al.*, *Schizophrenia and the Family* (1966); Lidz, *et al.*, *The Intrafamilial Environment of Schizophrenic Patients. II. Martial Schism and Marital Skew*, 114 Amer. J. of Psychiatry 281 (1957). See generally Fleck, *Some Basic Aspects of Family Pathology*, in Wolman, ed., *Manual of Child Psychopathology* 189 (1972). For similar findings regarding the retarded, see authorities cited at notes 45, 48 and 50 *supra*.

[86] See Testimony of Dr. Ingall at 588a, 610a; Dr. Messinger at 616a-619a; Dr. Masterson at 733a-734a; Dr. Tashjian at 668a-669a; Dr. Feiner at 467a-469a, 471a-472a, 501a-502a. See authorities cited note 85 *supra*; Wohlman, *Family Dynamics and Schizophrenia*, 6 J. of Health and Human Behavior 147 (1965); Wohlman, *Children Without Childhood: A Study in Childhood Schizophrenia* (1970).

[87] See Testimony of Dr. Masterson at 733a; Dr. Feiner at 468a. One court which noted the possibility that a "breakdown in parental control" of a child could result from failings in the

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The record in this case indicates that parents will often seek to institutionalize children for improper reasons. This stems from honest mistakes, ignorance, lack of community resources or sometimes from malice or ill will.[88] In a significant numbers of cases, the parental purpose of bringing a child to treatment "has been to accuse him, to punish him, to separate him from the home. The motivation is not always good."[89]

Experts for both plaintiffs and defendants were in agreement that parents are not particularly good observers of children's behavior and symptoms and, especially with the high feelings that run in conflict situations, parents are not reliable sources of factual information about the child and his or her behavior.[90] Parents who bring their child to psychiatrists seeking care "can't be objective reporters" of the behavioral background of the child.[91] Parents often exaggerate and

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parent rather than in the minor, required inquiry into "intra-family parent-child conflict." *In re Henry G.*, 28 C.A.2d 276, 284-285, 104 C.R. 585 (1972), describes the issue in this way:

> The Fourth Commandment is still an integral part of the beliefs of our society. It is one thing, however, to say that a teen-age minor has struck the parent—it is another thing if that striking is done in self-defense and in response to traumatic situations initiated by the parent.

[88]See Testimony of Dr. Kandler at 543a, 553a-554a; Dr. Miller at 685a ("conflict of interest between adolescents and their parents"). See notes 45, 48 and 50 *supra.*

[89]Testimony of Dr. Ingall at 601a.

[90]See Testimony of Dr. Masterson at 733a; Dr. Kandler at 543a; Dr. Ingall at 592a, 601a; Dr. Sugar at 401a.

[91]Testimony of Dr. Feiner at 478a. See Testimony of Dr. Messinger at 623a-624a.



misinterpret the actions of their children and may often react antagonistically to their children.[92]

The decision of the lower court that parents' interests do not negate the rights of their children in the mental commitment context was manifestly correct.[93] Where parents in this conflict situation apply to

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[92]See Testimony of Dr. Sugar at 404a-408a. For the particular pressures on parents of the retarded, see authorities cited at notes 45, 48 and 50 *supra.* See also notes 85-87 *supra.*

[93]401 F. Supp. at 1048; 798a. The District Court and the defendants approach the issue as one of parental power to "waive" children's rights. While the result is the same, plaintiffs do not believe that the constitutional concept of waiver is relevant in this conflict situation. There is no case in which parents have been found to have waived the constitutional rights of their children or not to have waived them. *Gault* discussed the issue of waiver with the Court noting that problems might arise "depending on the age of the child and the presence and competence of the parents." 387 U.S. at 55. See *Heryford v. Parker,* 396 F.2d 393, 396 (10th Cir. 1968) (issue described but not decided).

In plaintiffs' view, the critical question is whether juveniles can be *deprived* of their rights by the state, acting on parental application. As Judge Urbom held in *Horacek v. Exon,* Civil Action No. 72-L-299 (D. Neb., Memorandum and Order of June 4, 1974), cited by the District Court at 797a:

> Equating the plaintiffs with their parents will not do. Such an elementary example as parental child abuse is enough to illustrate that a child has rights a parent cannot take away. Without detailed explanation, I simply hold that parents cannot deprive their children of constitutional rights—rights of the children vis-a-vis the state.

This approach is consistent with that followed by this Court in the parental consent to abortion cases where the effect of parental powers on children's rights was assessed without the

*(continued)*

the state for confinement of their children in residential mental institutions,[94] the "fundamental fairness" of due

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need to inquire into parental competence to "waive" the rights involved. See *Danforth* and *Bellotti, supra* at 53.

Should the Court undertake to consider the waiver issue, plaintiffs submit that parental application for state commitment without more cannot be considered a valid waiver of a child's rights to counsel and an opportunity to be heard. A waiver of constitutional rights must be made "voluntarily, knowingly and intelligently." *Miranda v. Arizona,* 384 U.S. 436 (1966). There must be an "intentional relinquishment or abandonment' of a fully known right." *In re Gault,* 387 U.S. 1, 42, quoting *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938).

A valid waiver may not be presumed from the silence of the person involved. *Miranda v. Arizona, supra; In Re Gault, supra,* 387 U.S. at 34. In cases involving juveniles, even apparent waivers have been invalidated. *E.g., Haley v. Ohio,* 332 U.S. 596, 601 (1948).

[94]Most parents would no doubt prefer not to institutionalize their children if they had the means to actualize alternatives. Where the desire to institutionalize is formulated, it is by no means certain (as defendants assume) that parents would oppose a due process hearing to protect their child. In the case at bar, the District Court suggested that parents' views be represented by the involvement of an organization of "parents of either retarded or mentally disturbed children . . . [as] an appropriate class action defendant" (234a). The *state defendants* initially *opposed* such parental representation arguing that it is the mental institution that has "the ultimate say in whether or not that child is institutionalized" (243a). In view of the Court's request, the defendants agreed to cooperate with the plaintiffs and dozens of contacts resulted in only one parent group joining the litigation. The Pennsylvania Association for Retarded Citizens filed a brief supporting the plaintiffs (4a).



process requires, at the least, notice, counsel and an opportunity to be heard.[95]

### F. Reliance Upon Psychiatrists Alone to Authorize Commitments is Misplaced.

The state defendants argue that the decision to confine a person in a mental institution is a medical one, accomplished for the benefit of the child, and that therefore a due process hearing is not required; mere approval by psychiatrists should suffice.[96]

[95]*Accord, J.L. & J.R. v. Parham,* 412 F. Supp 112, (M.D. Ga. 1976), stay granted, ___ U.S. ___ , 44 U.S.L.W. 3563 (April 5, 1976); *Kidd v. Schmidt,* 399 F. Supp. 301 (E.D. Wis. 1975) (juvenile mental patients held entitled to preliminary injunction against parental commitment statute); *Saville v. Treadway*, 404 F. Supp. 430 (M.D. Tenn. 1974); *In re Long,* 25 N.Ca.App. 702, 214 S.C.2d 626 (1975). See *In re Sippy,* 97 A.2d 455 (D.C. Mun. App. 1953, in which a mother sought to have her teenage daughter committed to a psychiatric facility, the Devereaux School, an *amicus* herein. The court found that the mother's interests were "antagonistic or at least sharply opposed" to the daughter's and held that it was error to permit the mother's attorney to represent the child. See also *New York State Association for Retarded Children v. Rockefeller,* 357 F. Supp. 752, 762 (E.D.N.Y. 1973); *Melville v. Sabbatino,* 30 Conn. Supp. 320 (Super. Ct. 1973).

[96]While the defendants at times appear to argue that parental discretion is unfettered in the institutionalization context, they rely on the institution's acceptance of the commitment application as the "fail-safe" to protect the juvenile's rights. Thus, the defendants appear to have fully abandoned their argument to the District Court that due process does not apply at all to this situation. 791a-793a; 402 F. Supp. at 1044-1045.

A mental commitment authorized by state law is without question a variety of deprivation which falls within the "liberty" clause of the Fourteenth Amendment, *O'Connor v. Donaldson*, 422 U.S. 563 (1975), and substantial procedural protections must accompany such a deprivation.[97] The magnitude of the state action, taken together with both the dangers inherent in commitment and the risks of error, demand a rigorous "emphasis on fact-finding procedures." *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971).[98] See *Specht v. Patterson*, 386 U.S. 605 (1967); *Baxstrom v. Herold*, 383 U.S. 107 (1966).

Mere approval by two psychiatrists[99] cannot support a commitment to a mental institution. *Dixon v. Attorney General of the Commonwealth of Pennsylvania*, 325 F. Supp. 266 (M.D. Pa. 1971).

Certainly, the state of the art of psychiatry is not such that the confinement of tens of thousands of persons should be left to the judgement of these practitioners alone. This field is beset with "uncertainty of diagnosis" and "tentativeness of professional judge-

[97]See cases cited *supra* at note 21.

[98]This case does not involve "second-guessing a medical diagnosis" or interference with the provision of standard medical care to juveniles. Brief for Appellants at 42. It is only when medical recommendations result in a deprivation of liberty, non-medical risks and imposition of stigma that, as in the case at bar, the protections of due process are triggered.

[99]This is what is required by the regulations supported by the defendants and rejected by the District Court.



ment." *Greenwood v. United States*, 350 U.S. 366 (1956).[100]

Mental illness is defined by the user of the term and that definition depends upon the norms employed by the definer:

> And, because of the unavoidably ambiguous generalities in which the American Psychiatric

[100]One important study showed that diagnoses of psychiatric residents were highly influenced by the imagined socio-economic status of the patient and by the perceived diagnosis of other psychiatrists *independent* of the clinical picture presented. Lee & Temerlin, *Social Class, Diagnosis and Prognosis for Psychotherapy*, in *Psychotherapy: Theory, Research and Practice* 181 (1970). See Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 Cal. L. Rev. 693 (1974), for a full review of the literature and the legal implications. Among the studies which support the above proposition include: Beck, *Reliability of Psychiatric Diagnoses: A Critique of Systematic Studies*, 119 Amer. J. of Psychiatry 210 (1962); Chesler, *Women and Madness*, (1972) (Chapter 2 "Asylums"); Edelman, *Intra-Therapist Diagnostic Reliability*, 25 J. of Clin. Psychology 394 (1969); Goldbert & Werts, *The Reliability of Clinicians' Judgements: A Multi-Trait–Multi-Method Approach*, 30 J. of Consulting Psychology 199 (1966); Katz, Cole & Lowery, *Studies of the Diagnostic Process: The Influence of Symptom Perception, Past Experience and Ethnic Background in Diagnostic Decisions*, 125 Amer. J. of Psychiatry 937 (1966) (44 experienced psychiatrists viewed a filmed interview with a patient. 17 saw the person as psychotic, 26 saw the patient as nonpsychotic. When British and American psychiatrists were compared, the British saw less pathology); Pasamanik, Divity & Lefton, *Psychiatric Orientation and Its Relation to Diagnosis and Treatment in a Mental Hospital*, 116 Amer. J. of Psychiatry 127 (1959); Rosensweig, *et al.*, *A Study of the Reliability of the Mental Status Examination*, 117 Amer. J. of Psychiatry 1102 (1961).

> Association describes its diagnostic categories, the diagnostician has the ability to shoehorn into the mentally diseased class almost any person he wishes, for whatever reason, to put there.

Livermore, Malmquist and Meehl, *On the Justifications for Civil Commitment*, 117 U. Pa. L. Rev. 75, 80 (1968).[101]

Institutional psychiatrists are faced with conflicts of interest – with their facilities,[102] with their patients and their patients' families[103] – and have great difficulty in

[101]See Roth, Dayler and Lerner, *Into the Abyss: Psychiatric Reliability and Emergency Commitment Statutes*, 13 Santa Clara Law. 400, 403 (1973). More than a hundred years ago, a court noted that commitment of children to reform school was based on differing perceptions of the status of "poor parental care:"

> . . . there is not a child in the land who could not be proved, by two or more witnesses, to be in this sad condition.

*People ex rel. O'Connell v. Turner*, 55 Ill. 280 (1870). The situation is the same today with regard to who can be proved in the "sad condition" of mental disturbance.

[102]See Testimony of Dr. Messinger at 629a-630a (pressures on psychiatrists to confirm colleagues' opinions and meet institutional needs) and Dr. Ingall at 599a (overcrowded clinics may overrecommend institutionalization).

[103]See Scheff, *Being Mentally Ill: A Sociological Theory* 148-149 (1966) (family request cases are generally automatic). Scheff also discusses a case in which a psychiatrist recommended a commitment for a young patient who was *not* thought mentally ill but who was having difficulties with his parents. *Id.* at 147. Where parents seek commitment of their child, the medical authority is forced to wear two hats:

> While the goal of the psychiatrist will be expressed–and perceived–as the best welfare of the child-patient, it is the parent who has come to seek help, whose situation seems

*(continued)*



telling the sane from the insane, tending toward an overdiagnosis of mental illness.[104] Psychiatry, asked to adjudicate interpersonal and societal conflicts, is often called upon to be the agent of the state's police powers in ways that carry it beyond its expertise.[105]

### G. Need For and Functions of a Hearing.

One expert cogently listed the issues to be faced and decided at a mental commitment hearing for juveniles:

> I think first of all, an agreement on what are the facts.
>
> Secondly, some assessment of how severe the pathology or disturbance of the child is.

*(footnote continued from preceding page)*

> the most desperate, who seems the most reliable source of information about what is wrong, who is the closest to the psychiatrist in age and social outlook, and who is paying the psychiatrist's fee.

Ellis, *Volunteering Children, supra* note 28, 62 Cal. L. Rev. at 868 (note omitted). This view is confirmed by the expert testimony herein for both plaintiffs and defendants. See Testimony of Dr. Feiner at 472a, 478a-479a; Dr. Sugar at 381a; Dr. Masterson at 732a-733a; Dr. Kandler at 542a; Dr. Ingall at 593a-594a; Dr. Messinger at 637a-638a.

[104]See Rosenhan, *On Being Sane in Insane Places*, 13 Santa Clara Law. 379 (1973), discussed in District Court Opinion at 804a, n. 20; 402 F. Supp. at 1050, n. 20. Indicative of this approach is the testimony for the defendants of Dr. Masterson who asserted that psychiatrists should first assume that the person before them is mentally ill (739a). See testimony at 737a-738a.

[105]See Bazelon, *Forward, Symposium: Mental Illness, the Law and Civil Liberties*, 13 Santa Clara Law. 367 (1973); Szasz, *Civil Liberties and the Mentally Ill*, 9 Clev-Mar. L. Rev. 399, 407 (1960).

> Thirdly, how dangerous the situation is, or might become.
>
> Fourthly, what else has been tried or might be tried.
>
> Fifth, what the adolescent himself says about the matter and what he thinks might be best for him and six, what the family thinks would be best for the boy [or girl].[106]

This is what the plaintiffs seek.

A pre-commitment judicial hearing for juveniles is proper and necessary in non-emergency situations.[107] Because of their immaturity and lack of experience, it is even more important that juveniles receive the protection of a hearing than adults.[108] This is especially true for those very young persons whom the state law totally neglects.

Assistance of counsel is essential and can help treatment of juveniles and can in no significant way hinder such treatment.[109] A hearing would not be unduly traumatic for juveniles and would not interfere with treatment or the parent-child relation; to the contrary, a hearing would encourage more appropriate

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[106]Testimony of Dr. Messinger at 640a. The manner in which these hearing functions affirmatively benefit the child is documented in the brief *amicus curiae* of the State of New Jersey, Department of the Public Advocate.

[107]See Testimony of Dr. Kandler at 542a - 545a, 566a, 571a - 572a, 573a - 574a; Dr. Ingall at 596a - 597a, 606a; Dr. Messenger at 622a - 623a, 625a, 630a - 631a; Dr. Feiner at 479a - 480a.

[108]See Testimony of Dr. Kandler at 562a; Dr. Ingall at 589a - 590a; Dr. Messinger at 630a - 631a.

[109]See Testimony of Dr. Kandler at 542a - 543a; Dr. Ingall at 597a; Dr. Messinger at 633a.



resolution of problems, and would have a positive and beneficial affect on the child.[110] See *In re Gault*, 387 U.S. at 26.[111]

Establishment of a due process forum for a decision to institutionalize lifts the heavy responsibility from the parents[112] and reduces the possibility that the therapist will be seen by the juvenile as an adverse party.[113] A hearing does not interfere with therapy and has the further effect of encouraging a juvenile's cooperation with a treatment plan.[114]

The opportunity for hearings would not discourage people from seeking treatment for juveniles, but would result in agencies and psychiatrists performing more effectively and in the avoidance of the necessity for hearings and of institutionalization.[115]

### H. The Requisites for a Due Process Hearing.

As the defendants cast their appeal, the only issue raised on the merits is the proper extent of parental

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[110]See Testimony of Dr. Kandler at 543a - 545a, 565a - 566a, 574a; Dr. Ingall at 591a, 596a - 597a, 611a - 613a.

[111]One expert, Dr. Feiner, testified that "... it has been said that some children would rather be fair than be loved. So, there is a sense that a judicial hearing responds to in children" (483a). See Testimony of Dr. Messinger at 624a.

[112]Testimony of Dr. Feiner at 481a, 495a.

[113]Testimony of Dr. Messinger at 624a - 625a; Dr. Ingall at 612a - 613a.

[114]Testimony of Dr. Kandler at 561a, 574a; Dr. Ingall at 597a; Dr. Messinger at 633a.

[115]See Testimony of Dr. Kandler at 574a; Dr. Messinger at 638a - 640a; Dr. Feiner at 494a - 495a.

authority in the context of state institutionalization.[116] No claim is made—if the District Court correctly determined that parental rights do not negate children's commitment rights—that the District Court erred in its prescription of notice, counsel, hearing and a "clear and convincing" standard of proof. Thus, this appeal does not raise any question regarding the *extent* of due process that applies in mental commitments.

The requirements of due process are flexible and depend upon an evaluation of the effect of government action on the private interest involved. *Cafeteria Workers Union v. McElroy*, 367 U.S. 886, 895 (1961). Notice, counsel, and an opportunity to be heard are fundamental requirements where a deprivation of liberty—for whatever reason—is involved. *E.g., Specht v. Patterson*, 386 U.S. 605 (1967); *Baxstrom v. Herold*, 383 U.S. 107 (1966); *In re Gault*, 387 U.S. 1 (1967).

In this case, the District Court narrowly shaped plaintiffs' relief, requiring only a hearing before "an unbiased tribunal" (rather than a judicial hearing)[117] and other procedures following, in the main, *Gault* and similar cases. The right to a jury trial was rejected[118] as

[116]This was not the defendants' position in the court below, where they maintained that "the requirements of due process do not apply to the institutionalizing of children . . . ." 791a; 402 F. Supp. at 1044-1045.

[117]The court below did not decide whether a judicial hearing is required on either Due Process or Equal Protection grounds; the issue is not before this Court on appeal. Note that the new Mental Health Procedures Act provides juveniles who challenge commitments with judicial hearings. *Supra* at 4.



was the right to a pre-commitment hearing.[119] All the procedures save notice and counsel, declared the District Court, may be waived upon approval by the unbiased tribunal; a full hearing need not take place every time a juvenile is institutionalized.[120]

Because the defendants have not briefed, argued or challenged the rudiments of due process the District Court required, the plaintiffs will merely summarize them to demonstrate that the procedures are well within the range of those suggested by decisions of this Court and the lower federal courts.[121]

### 1. Notice

Without advance notice, the District Court correctly held, the fundamental "right to be heard has little significance."[122] In mental commitment cases, notice is

[118]See *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

[119]A major justification for denial of an invariable right to a pre-commitment hearing was the state's "interest in the immediate detention of children who may be dangerous to themselves or others." 800a-801a; 402 F. Supp. at 1049. Thus, the decision does not threaten to foreclose proper expeditious procedures in emergency situations.

[120]"We neither intend nor expect that all of these procedures will be required every time an attempt to institutionalize a child is made." 811a, n. 26; 402 F. Supp. at 1053, n. 26.

[121]See cases cited at note 21 *supra*.

[122]802a; 402 F. Supp. at 1050, citing, *inter alia*, *Grannis v. Ordean*, 234 U.S. 385, 394 (1914); *In re Gault*, 387 U.S. 1 (1967); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950).

at least as essential, if not more so, than in proceedings which do not result in deprivation of liberty. *Cf., Goldberg v. Kelly,* 397 U.S. 254 (1970). Where a proceeding will be held which will determine whether a person is indeterminately and involuntarily institutionalized, advance notice is imperative.

The speculative fear of an unspecified trauma flowing from notice cannot justify abandonment of this first step in providing a process which is due under the circumstances. *In re Gault,* 387 U.S. 1 (1967). In its recent comprehensive study, the American Bar Foundation noted:

> The humanitarian desire to eliminate or curtail the use of notice in such cases raises certain questions, however. It may be, for example, that the experience of receiving notice would prove no more traumatic for the patient than the experience of suddenly finding himself detained in a mental institution.[123]

The record in the case at bar supports the conclusion that this element of due process would not traumatize the juveniles involved. See references at notes 107-111 *supra.*

Requiring written notice of the date, time and place of the hearing and a statement of the grounds for the proposed commitment,[124] the District Court acted to "protect children not in need of institutionalization from wrongful commitment and improper deprivation

[123]American Bar Foundation (Brakel & Rock, eds.), *The Mentally Disabled and the Law* 51 (1971).

[124]803a; 402 F. Supp. at 1050.



of their liberty."[125] Notice is one of the two rights (the other is the right to counsel) which were held to be unwaivable. 811a, n. 26; 402 F. Supp. at 1053, n. 26. This makes good sense. "Since effective notice is a prerequisite to the exercise of an individual's other due process rights, mandatory notice should itself be a requirement of due process" in mental health cases. Note, *Developments in the Law—Civil Commitment of the Mentally Ill,* 87 Harv. L. Rev. 1190, 1274-1275 (notes omitted) (1974) (hereafter cited "Developments").[126]

### 2. Counsel

In criminal proceedings, *Argersinger v. Hamlin,* 407 U.S. 25 (1972), and in juvenile proceedings, *In re Gault,* 387 U.S. 1 (1967), the guiding hand of counsel is a right which assures that no person is deprived of liberty without the aid of an expert able to "cope with problems of law, to make skilled inquiry into the facts,

[125]*Id.* Eighty years ago, in a landmark and often-cited case, the Kansas Court of Appeals explained the logic of requiring notice in mental commitment proceedings:

> Notice and opportunity to be heard lie at the foundation of all judicial procedures. They are fundamental principles of justice which cannot be ignored . . . it will not do to say that it is useless to serve notice on an insane person; that it would avail nothing because of his inability to take advantage of it. His sanity is the very thing to be tried.

*In re Wellman,* 3 Kan. App. 100, 103, 45 P. 726, 727 (1896).

[126]Because some juveniles may not understand the notice, the juvenile's attorney must receive it as well. 803a, n. 19; 402 F. Supp. at 1050, n. 19.

to insist upon regularity of the proceedings and to ascertain whether he [or she] has a defense and to prepare and submit it." *Gault*, 387 U.S. at 36.[127]

Without counsel, a juvenile would be helpless; the right to be heard would be of little avail. *Argersinger, supra*, 407 U.S. at 31. Mandatory appointment of counsel in juvenile commitments assures that a child has the full support necessary to avoid pressures of family and institutions and to assist in making the critical decision whether to waive an evidentiary hearing. See *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962); *Haley v. Ohio*, 332 U.S. 596, 599-601 (1948). See also Harris, *Mental Illness, Due Process and Lawyers*, 55 A.B.A.J. 65 (1969) (danger that young persons will be induced to commit selves to mental institution unless their rights are explained to them by lawyers). With parents, doctors and psychiatric workers all urging commitment, and with no independent confidant, it is unlikely that a child can make an "intentional relinquishment or abandonment" of a fully known right. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

### 3. Hearing

Both a probable cause hearing and a full hearing must occur within a reasonable period of time in order to support an indefinite mental commitment. *In re Barnard*, 455 F.2d 1370 (D.C. Cir. 1971); *Lessard v. Schmidt, supra* note 21. In order to determine if "the nature and duration of confinement bear some

[127]Other recent mental health cases support the right to counsel. *E.g., Lessard v. Schmidt; Lynch v. Baxley; Heryford v. Parker*, all *supra* at note 21.



reasonable relation to the purpose for which the individual is committed," *Jackson v. Indiana*, 406 U.S. 715, 738 (1972), a hearing is indispensable. See *McNeil v. Director, Patuxent Institution*, 407 U.S. 245 (1972). Because of the inadequate record in this regard, and because of the need to permit states the flexibility to experiment with various time frames, there is no need for the Court in this case to specify the times by which hearings must be held.

### 4. Presence of Person

While the right to be present is not absolute, *Illinois v. Allen*, 397 U.S. 337 (1969), there can be no doubt that persons subject to civil commitment have a right to be present, *Specht v. Patterson*, 386 U.S. 605 (1966), and that the right has value to others beside the subject of the proceedings. The individual's appearance provides the factfinder with an opportunity to observe his or her demeanor and to compare observations with those of the psychiatrists, parents and other witnesses. See Note, *Developments, supra* at 71, 87 Harv. L. Rev. at 1282-1283. This "day in court" permits the juvenile to challenge the accuracy of reports of alleged conduct which prompted the initiation of the proceedings.

### 5. Rights at the Commitment Hearing

The District Court held that "because of the tremendous personal as well as societal loss error might cause," juveniles facing involuntary indeterminate mental institutionalization are entitled to "the rights to

confront and to cross-examine witnesses against him, to offer evidence in his own behalf and to offer testimony of witnesses. . . ." 810a; 402 F. Supp. at 1053. These traditional factfinding tools are essential in the commitment process so that conflicts may be resolved and the true state of affairs ascertained. *Specht v. Patterson, supra,* 386 U.S. at 610; *Lynch v. Baxley,* 386 F. Supp. 378, 394 (M.D. Ala. 1974), citing, *Washington v. Texas,* 388 U.S. 14, 19 (1967).

**6. Standard of Proof**

The dangers of erroneous commitment must be weighed against the dangers of not committing those who may be said to require institutionalization; this is the analysis required to determine the appropriate standard of proof. While in juvenile proceedings, this Court has required a reasonable doubt standard, *In re Winship,* 397 U.S. 358 (1969), lower courts are divided on the standard to be utilized in the similar mental health context. See *In re Ballay,* 482 F.2d 648 (D.C. Cir. 1973) (reasonable doubt); *Lessard v. Schmidt, supra* at note 21 (reasonable doubt); *Suzuki v. Quisenberry,* 411 F. Supp. 1113 (D. Hawaii 1976) (reasonable doubt); *Lynch v. Baxley,* 386 F. Supp. 378 (M.D. Ala. 1974) (clear, unequivocal and convincing); *Dixon v. Attorney General of the Commonwealth of Pennsylvania,* 325 F. Supp. 966 (M.D. Pa. 1971) (clear, unequivocal, convincing). Because both the delinquency and the mental health processes involve a "complete loss of liberty through a state-imposed confinement" and severe social stigma, *In re Winship, supra,* 397 U.S. at 374 (Harlan, J.), the plaintiffs submit that the District Court erred in not requiring the higher standard of proof.



The District Court here adopted the clear and convincing standard, choosing not to follow *Winship* because the undeveloped state of psychiatry "creates too great a risk of erroneously releasing children in need of institutionalization." 809a; 402 F. Supp. at 1053.

Although clearly sustainable, the District Court's decision on the standard of proof need not and ought not be addressed by this Court in the absence of any argument on the issue by the defendants and in light of the conflict among the courts, a conflict not present on the other issues discussed above.

**I.**

**I. Neither the State's Regulations nor the Revised Statute Affect the Unconstitutionality of Commitment without Hearing and Counsel**

After the filing of this lawsuit, the defendants adopted regulations[128] which would apply to juveniles in commitments upon parental application. A referral to the institution is required and, only for persons at least thirteen, notice is given that, if objection is made, legal counsel can be called. After at least two days of institutionalization, a court proceeding may be instituted against the objecting juvenile. There is no requirement that the hearing be held at any particular time after commitment–it may take one week, two weeks, a month or more, for all the regulations neglect

[128]Reproduced at Brief for Appellants 9-15.

to say, until due process is afforded that small portion of the class between 13 and 18. There is no provision at all for persons under 13 who are at least equally in need of protection.

The referral body's psychiatric or psychological evaluation, confirmed by the institution, is not a proper legal basis for commitment. It is unconstitutional for persons to be placed in mental facilities solely on the basis of medical certifications. *Dixon v. Attorney General of the Commonwealth of Pennsylvania, supra; Heryford v. Parker, supra;* see cases cited at note 21 *supra.* See also *Wyatt v. Aderholdt,* 358 F. Supp. 1382 (M.D.Ala.1973) (three-judge court) (sterilization of retarded "cannot be left to the unfettered discretion of any two officials or individuals"). The regulations here codify exactly what the law condemns.

With regard to those over thirteen, the regulations apply only *after* commitment. Any due process must occur *before* an indefinite institutionalization and must provide notice and counsel as well as hearing. See discussion and cases cited *supra* at 67-75. After the child is brought to the hospital, or has been diagnosed by the referring agency, it is unlikely the juvenile will be released.[129]

The regulations do not protect the susceptible juvenile from succumbing to pressures and involuntarily acquiescing in the commitment:

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[129]

> Once the psychiatrist has made a "diagnosis," the patient is considered "sick." The psychiatrist does not have to prove his allegation (in court or outside of it). But the patient must now prove, as it were, that he is "not sick."

Szasz, *Civil Liberties and the Mentally Ill,* 9 Clev-Mar. L. Rev. 399, 407 (1960).



> The fact that a new "patient" may act in a passive manner and not protest should not be taken "to be a meaningful acceptance of commitment."

Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill,* 44 Tex L. Rev. 424, 447 (1966). See *Haley v. Ohio,* 322 U.S. 596 (1948); *In re Gault,* 387 U.S. 1 (1966).

There must be a consultation with an attorney before the juvenile is asked to sign the complex waiver the regulations provide:

> Because young persons usually are more susceptible to persuasion than are older persons, there is a greater danger that they will be more easily induced to commit themselves voluntarily to mental hospitals unless their rights are carefully explained to them by lawyers.

A. Harris, *Mental Illness, Due Process and Lawyers,* 55 A.B.A.J. 65 (1969).[130]

It would be harmful and counter-therapeutic to follow the state's regulations and allow only a post-commitment hearing. As one expert testified:

> I think it is a most inadequate provision and it is closing the barn door after the horse is out. I think it is disastrous to hospitalize a child and then find out, by golly, it wasn't necessary. That is playing with a child's life.[131]

Pennsylvania has revised its commitment law with respect to a *portion* of the plaintiff class. While persons 18 and younger alleged to be retarded are still

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[130]See Testimony of Dr. Messinger at 631a-632a; Dr. Miller at 702a (unauthorized punishment for juvenile requesting attorney).

[131]Dr. Messinger at 631a. See Testimony of Dr. Feiner at 482a and Dr. Ingall at 596a.

committed under the original law and regulations, persons 13 and younger alleged to be mentally ill are committed in a similar fashion[132] under the revised law. Thus, the revised law continues the procedures without change for the great majority of the plaintiff class.[133]

## II.

## THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REQUIRING THE DEFENDANT STATE OFFICIALS TO ASSURE THAT JUVENILES PRESENTLY COMMITTED RECEIVE CONSTITUTIONAL STATE PROCEDURES TO DETERMINE WHETHER THEY ARE MENTALLY DISABLED AND IN NEED OF INSTITUTIONALIZATION.

### A. Preiser v. Rodriguez Does Not Bar Relief for Juveniles Presently Committed.

The complaint herein requested injunctive and declaratory relief[134] to assure constitutional state procedures in the hospitalization of children in mental institutions. Seeking only the guarantee of a state forum in which to have the claims against them determined, the plaintiffs sought from the federal court

[132]The new procedure for the mentally ill is remarkably identical to the former procedure under the regulations.

[133]See note 20 *supra.*

[134]An initial prayer for damages was voluntarily withdrawn early in the litigation.



neither release nor any order with regard to their custody.[135]

The class defined by the complaint and by the District Court[136] included *all juveniles "who have been, are,* or may be" committed upon parental application (emphasis added). Thus, *ab initio,* the plaintiffs have sought relief for those persons presently institutionalized as well as those who may be institutionalized in the future.

In Paragraph 15(E) of its Final Order,[137] the District Court enjoined the defendants to "initiate procedures, commencing immediately, to assure that all children eighteen years of age or younger already admitted or committed" under the challenged laws be provided with the procedures required by the decision.

The defendants object[138] to this portion of the order[139] and argue that it is barred by the principle of

[135]See Complaint at 22a-23a. Individual plaintiffs did allege that they objected to their commitments.

[136]Complaint at 10a-11a; Order of April 29, 1974 at 270a; Opinion, 402 F. Supp. at 1041; 783a; Final Order at 844a.

[137]Paragraph 15(E) is reproduced at 851a.

[138]Despite lengthy prior notice of the broad class definition, and the presence of defendants' counsel in open court when the definition was drafted (255a-256a), the defendants did not object to the possibility of relief for presently confined persons until the very end of the litigation (838a-839a). The District Court never directly ruled on this belated objection but merely issued its Final Order reasserting Paragraph 15 (E) as it appeared in the Proposed Order with certain additions. *Cf.* 832a with 851a-852a. The argument made here in the text presupposes that this Court reaches this issue.

[139]The defendants do not appear to object to any portion of Declaratory Relief granted (844a-848a).

*Preiser v. Rodriguez*, 411 U.S. 475 (1973), and the necessity that plaintiffs seek state habeas corpus relief.

The District Court ordered the defendant state officials to initiate procedures to assure that all juveniles committed without hearings or counsel under the unconstitutional statutes receive the benefit of "accurate fact-finding," *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971), in a state forum.

Appellants' assertion that *Preiser v. Rodriguez*, 411 U.S. 475 (1972), and *Wolff v. McDonnell*, 418 U.S. 539 (1973), bar such relief is based on a misreading of those cases and a failure to note other actions of this Court which support the District Court's order.

*Preiser* and *Wolff* held that litigants could not obtain from the federal courts, in actions under 42 U.S.C. §1983, relief affecting "the fact or duration of confinement" or effecting "immediate or a speedier release."[140] *Wolff* noted that "an injunction restoring good time improperly taken is foreclosed" but specifically permitted federal courts to "fashion appropriate remedies for any constitutional violations ascertained, short of ordering the actual restoration of good time already cancelled."[141]

The District Court faithfully followed *Wolff's* proscription. It did not order "actual restoration" of liberty to plaintiffs and their class; it simply ordered that the defendant welfare department officials assure that proper state proceedings be afforded persons who had never had them. It would be in these state proceedings (not in the federal court) that commitment

[140] *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973).

[141] *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974).



determinations would be made. The alternative to this orderly process would have been to allow the possibly erroneous commitment of thousands of persons to stand.

This Court's decision in *Gerstein v. Pugh*, 420 U.S. 103 (1975), directly supports the District Court and explains the error in appellants' argument:

> Respondents did not ask for release from state custody, even as an alternate remedy. They asked only that the state authorities be ordered to give them a probable cause determination. This was also the only relief that the District Court ordered for the named respondents. 332 F. Supp. at 1115-1116. Because release was neither asked nor ordered, the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy. *Preiser v. Rodriguez*, 411 U.S. 475, 93 S. Ct. 1827, 36 L.Ed.2d 439 (1973); see *Wolff v. McDonnell*, 418 U.S. 539, 554, 94 S. Ct. 2963, 2973, 41 L.Ed.2d 935 (1934).

*Id.* at n. 6.[142] See *Gomez v. Miller*, 341 F. Supp. 323 (S.D.N.Y. 1972), aff'd sub. nom., *Miller v. Gomez*, 412 U.S. 914 (1973) (class action challenging constitutionality of pretrial confinement in state mental hospital for the criminally insane; relief sought and upheld was a state "determination of dangerousness as a prerequisite to retention").

[142] In *Gerstein*, as in this case, persons were deprived of their liberty for a substantial period without a probable cause hearing. The relief granted in *Gerstein*, as in this case, assured constitutional proceedings in a state forum.[143]

[143] See *Hartman v. Scott*, 488 F.2d 1215 (8th Cir. 1973); *Bradford v. Weinstein*, 519 F.2d 728 (4th Cir. 1974), appeal dismissed on other grounds, ___ U.S. ___, 46 L.Ed.2d 350 (1975); *Joyce v. Gilligan*, 383 F. Supp. 1028 (N.D. Ohio 1974); *Winegard v. State of North Carolina*, 366 F. Supp. 983

*(continued)*

Appellants' reliance on *Kendall v. True*, 391 F. Supp. 413 (W.D.Ky. 1975), is misplaced. That case did not consider or discuss the *Preiser* issue. Also, the plaintiff mental patients in *Kendall* were incarcerated under a statute which provided for a maximum hospital term of 60 days and under which a judicial hearing and counsel were provided. Here, the plaintiffs are under an indeterminate term and have had no hearing or counsel.

Defendants further argue that, if it is held that those plaintiffs covered by Paragraph 15(E) must utilize habeas corpus, the exhaustion requirements of 28 U.S.C. §2254(b) would apply.

Section 2254(b)[144] applies only to "persons in custody pursuant to the judgment of a state court."[145]

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*(footnote continued from preceding page)*
(W.D.N.C. 1973); *United States ex rel. Johnson v. Chairman of the New York State Board of Parole*, 363 F. Supp. 416 (E.D.N.Y. 1973).

A Three-Judge Court in Pennsylvania recently became the first to address the *Preiser* issue in the mental health context. *Goldy v. Beal*, ___ F. Supp. ___ (M.D.Pa., July 8, 1976), in enjoining as unconstitutional the state civil commitment law, held that *Preiser* did not bar such relief following the analysis suggested in the text.

[144]This statute is reproduced at Brief for Appellants 59, n.61.

[145]If plaintiffs' Section 1983 claims went "directly" to the propriety of their confinement and sought from the federal court either "immediate release" or a "shortening" of confinement, then under *Preiser* they would be fatally "close to the core of habeas corpus" even though they are not in custody under a state court judgment. *Preiser*, 411 U.S. at 489. However, where no such relief is sought or obtained and where the federal court specifically defers to the state courts to decide the propriety of individuals' confinements, the literal terms of the statute should be held to apply and exhaustion not required.



Plaintiffs were all committed without any involvement of a state court or other adjudicatory body whatsoever.

Section 2254(b) also exempts from its ambit situations where there is an "absence of available State corrective process or the existence of circumstances rendering such process ineffective . . ." Even if each or some of the thousands of institutionalized young people in Pennsylvania could succeed in obtaining counsel to file state habeas petitions, *the petitions would not be heard because, by its very terms, the state habeas corpus statute for mental patients does not apply to plaintiffs.*[146]

Habeas corpus jurisdiction is limited by the state statute to persons committed by a court or under two sections of law not relevant here.[147] 50 P.S. 4426(c). Thus, there is no state corrective process available and effective to protect the plaintiffs' rights; no exhaustion of remedies is required because there are none to exhaust.

Principles of federalism were similarly respected by the District Court. No state proceedings were interfered with; in fact, the state executive, judicial and legislative branches are left free to continue commitment of juveniles, so long as the procedures used do not violate the Constitution.

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[146]The statute, 50 P.S. §4426, is reproduced at Brief for Appellants 8-9 and referred to *ibid* at 59. This statute is repealed by the new Mental Health Procedures Act insofar as it applies to the mentally ill, not the retarded.

[147]Section 404, held unconstitutional in *Dixon v. Attorney General of the Commonwealth of Pennsylvania*, 325 F. Supp. 966 (M.D.Pa. 1971), and Section 405 (emergency "dangerousness" commitments).

Contrary to defendants' dire speculations of "a clash between the federal and state judicial systems," *Brief for Appellants* at 62, those systems worked in concert in this case until the Final Order issued.[148] While the District Court never had the opportunity to rule directly on this federalism issue,[149] it did assure avoidance of any direct conflict as it issued no injunctive relief against the state courts. The interim declaratory relief[150] both respected the integrity of the state judicial system and comported with the extremely broad range of remedies proper upon a finding of constitutional violations, *Hills v. Gautreau,* ___ U. S. ___ (1976). *Cf. Rizzo v. Goode,* 423 U.S. 362 (1975) (no constitutional violation found).[151]

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[148]See discussion at 17 *supra* and letters between the courts at Appendix *infra.*

[149]*Id.* The entire issue, therefore, is one which should not and need not be decided by this Court.

[150]Paragraph 11 of the Final Order (846a).

[151]The District Court, in its opinion and final order, specifically noted its deference to the principles enunciated most recently by this Court in *Rizzo v. Goode,* 423 U.S. 362 (1976). The District Court explained:

> As we have already noted, due process is flexible; the Constitution mandates no specific code of procedures. We are aware of the problems facing courts when they attempt to fashion procedures protecting language of the Fourteenth Amendment and we are sensitive to the claim that courts are "good at deciding cases, bad at drafting legislation. . . ." See, Friendly, J. "Some Kind of Hearing," *supra.* When presented with claims of constitutional dimension, however, we are constrained, when legislative bodies have failed to act, to find means of enforcing the constitutional rights being denied. Our action is not intended to pre-empt the state which is free to develop its own safeguards so long as they are as fully effective as
> *(continued)*



The alternative to requiring this orderly state constitutional process would have been to permit the indefinite and possibly erroneous mental commitments of thousands of persons, all without a state remedy to pursue. The solution adopted by the District Court is well within its power for, "in constitutional adjudication, as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable." *Lemon v. Kurtzman,* 411 U.S. 192, 200 (1973) (note omitted).[152]

### B. The District Court's Requirement of Constitutional State Procedures for Persons Presently Committed Does Not Violate the Eleventh Amendment.

The defendants argue that the District Court violated the Eleventh Amendment when it ordered[153] that persons presently incarcerated unconstitutionally be provided state procedures to determine whether they require commitment. In their analysis, the defendants claim that the cost of providing this relief to juveniles

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*(footnote continued from preceding page)*

> those which we set out. See Miranda v. Arizona, 384 U.S. 436, 490, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966); Morrissey, 408 U.S. at 490, 92 S. Ct. 2593.

Opinion at 800a, n. 16; 402 F. Supp. at 1048-1049, n. 16. The legislature is free to develop an alternate constitutional system. Opinion at 802a, n. 18 and 803a, n. 19; 402 F. Supp. at 1049, n. 18 and 1050, n. 19.

[152]In that case, the Court noted, "In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow." *Id.* (citation omitted).

[153]851a - 852a (Paragraph 15E).

presently incarcerated without hearings may not be imposed on the state.[154] The Eleventh Amendment dictates no such result.

The Eleventh Amendment bars suits by citizens against unconsenting states. *Hans v. Louisiana*, 134 U.S. 1 (1890). However, federal courts have undoubted authority to entertain suits against state officials where they act unconstitutionally. *Ex Parte Young*, 209 U.S. 123 (1908).

In the case at bar, the enforcement of Pennsylvania's commitment law was found unconstitutional. The District Court did not award damages or "equitable restitution" of funds from the state treasury; expenditure of state funds to implement the decree is incidental to the constitutionally mandated goal of assuring that persons are not erroneously incarcerated. This Court has frequently required equitable relief having substantial fiscal impact on a state. Such impact, held *Edelman v. Jordon*, 405 U.S. 651, 667-668 (1974), is not barred by the Eleventh Amendment:

> The injunction issued in *Ex parte Young* was not totally without effect on the State's revenues, since the State law which the Attorney General was enjoined from enforcing provided substantial monetary penalties against railroads which did not conform to its provisions. Later cases from this Court have authorized equitable relief which has probably had greater impact on state treasuries than did that awarded in *Ex parte Young*. In *Graham v. Richardson*, 403 U.S. 365 (1971), Arizona and Pennsylvania welfare officials were

[154]Defendants do not assert that any of the injunctive relief granted by the District Court as to future commitments violates the Eleventh Amendment.



> prohibited from denying welfare benefits to otherwise qualified recipients who were aliens. In *Goldberg v. Kelly*, 397 U.S. 254 (1970), New York City welfare officials were enjoined from following New York State procedures which authorized the termination of benefits paid to welfare recipients without prior hearing. But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prosective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young, supra.*[155]

415 U.S. at 667-668 (note omitted). Surely "equitable restitution" of funds directly to plaintiffs, held in *Edelman* to resemble monetary damages, is a far cry from requiring compliance with procedural due process.

[155]See, *Ad Hoc Committee on Judicial Administration v. Massachusetts*, 488 F.2d 1241, 1243, n 2 (1st Cir. 1973):

> Courts have not limited the Ex parte Young doctrine to "negative" relief, and have often ordered positive governmental action. In cases involving deprivation of constitutionally protected rights, "affirmative" relief has been granted, notwithstanding the fact that the incidental effect is that the states will be forced to expend funds from its treasury. See e.g., *Graham v. Richardson*, 402 U.S. 365, 91 S. Ct. 1848, 29 L.Ed.2d 534 (1971); *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799 (1963); *Inmates v. Eisenstadt*, 360 F. Supp. 676 (D.Mass. 1973); *Martarella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972).

*Edelman*, the only case relied on here by defendants, held only that a federal court's remedial power "may not include a retroactive award which requires the payment of funds from the state treasury." 415 U.S. at 677. This decision that a governmental cash benefits program would be disrupted by the drain of additional unallocated welfare benefit payments cannot be read to sanction the State's desire, in this case, to continue to confine in mental institutions, without hearings, thousands of juveniles.

## CONCLUSION

For the above reasons, appellees respectfully submit that the judgment of the District Court should in all respects be affirmed.

Respectfully submitted,

DAVID FERLEGER
*Counsel for Appellees*

August, 1976



## APPENDIX

### UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

H. HUYETT, 3RD
JUDGE

12614 UNITED STATES COURTHOUSE
INDEPENDENCE MALL WEST
PHILADELPHIA, PENNSYLVANIA 19106
215-597-9644

September 16, 1975

Honorable Alexander F. Barbieri
Court Administrator of Pennsylvania
Room 317, Three Penn Center Plaza
Philadelphia, Pa. 19102

Re: *Bartley, et al. vs. Kremens, et al.*
*(C.A. No. 72-2272)*

Dear Judge:

As a follow-up of your call to me of the other day, I have talked to the other members of the three-Judge court in the above case and we shall, of course, touch base with you before we hand down a Final Order.

Our case, of course, concerns all persons eighteen years of age or younger who have been admitted or committed to mental institutions in Pennsylvania under the sections of the Act which concerned our three-Judge court.

Judge Gibbons suggested that you might wish to talk to the Administrative Office of the New Jersey Courts in Trenton because sometime ago Chief Justice Hughes required the New Jersey Courts to review every file of every patient of state mental institutions and it may be that the experience of the New Jersey Administrative

Office in that massive undertaking may be helpful to you.

In any event, I shall keep in touch with you.

With kindest personal regards.

Very sincerely yours,

/s/ Dan
Daniel H. Huyett, 3rd

DHH/dr



SUPREME COURT OF PENNSYLVANIA

ADMINISTRATIVE OFFICE OF PENNSYLVANIA COURTS
317 THREE PENN CENTER PLAZA
PHILADELPHIA, PENNSYLVANIA 19102
(215) 567-3071 — 686-3578

EXANDER F. BARBIERI
JUDGE
ADMINISTRATOR OF PENNSYLVANIA

DEPUTY COURT ADMINISTRATORS
CARLILE E. KING, ESQUIRE
GERALD W. SPIVACK, ESQUIRE
ROBERT F. KENT, ESQUIRE

October 14, 1975

RECEIVED
OCT 15 1975

The Honorable Daniel H. Huyett, 3rd
Room 12614
601 Market Street
Philadelphia, Pennsylvania 19106

Dear Judge Huyett:

#72-2272

Re: *Bartley v. Kremens*, #72-2272

Many thanks for your kind letter of September 16, and for efforts on my behalf.

Please thank the other members of your three-judge court for their thoughtfulness.

I like your idea of contacting the New Jersey Administrative Office. Judge Simpson, the judge who manages the New Jersey court systems, is a friend of mine, and we frequently discuss our mutual administrative problems.

Again, many thanks to all of you, and I will await your advices.

Sincerely yours,

/s/ Alex
Alexander F. Barbieri
Court Administrator of Pennsylvania

AFB:ek



SUPREME COURT OF PENNSYLVANIA

ADMINISTRATIVE OFFICE OF PENNSYLVANIA COURTS
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ROBERT F. KENT, ESQUIRE

October 15, 1975

The Honorable Daniel H. Huyett, 3rd
United States District Court
Eastern District of Pennsylvania
United States Courthouse
Sixth and Market Streets
Philadelphia, Pa. 19107

RECEIVED
OCT 17 1975

Dear Judge Huyett:

Re: *Bartley, et al. v. Kremens*
*Civil Action No. 72-2272*

As you know, the Administrative Office of Pennsylvania Courts is extremely concerned about, and sensitive to, Federal Court decisions which impose substantial new hearing burdens on an already overtaxed state judiciary. We deeply appreciate your diligence and cooperation in permitting the Pennsylvania Judicial System, by the Court Administrator, to be involved in the drafting of a final Order in the above

matter, because of the large potential hearing responsibility which the decision places upon our state trial system.

We have talked frequently with the Office of the Attorney General of Pennsylvania, principally through Lawrence Silver, Esquire, and Barry Roth, Esquire, concerning a proposed final Order submitted by them, as well as the draft Order circulated by your Honor within the past several weeks. We understand that all interested parties, including this office, have been requested to submit comments or exceptions to the proposed drafts on or before October 17, 1975 to the Court and to all parties. In compliance with your request, we therefore submit our exceptions to you for your early consideration.

We realize that we are not a formal party to these proceedings and that our involvement must therefore be peripheral. We are anxious to have the Court review our reactions to the *Bartley* Opinion and its practical thrust, and to appreciate some of the administrative difficulties faced by the Pennsylvania Judicial System in gearing up for this newly imposed hearing responsibility. We refer to the concern expressed by the Attorney General of Pennsylvania in his letter to you dated August 21, 1975, wherein at page three it is stated the burden imposed on the Pennsylvania court system is potentially substantial and that our advice should be entertained. We wish to be supportive of the exceptions taken by the Attorney General and add our own as of particular concern to us.

We shall refer to the particular sections of your proposed Order by page and number.



*Page 2, No. 3:* The provision for notice to the child's attorney at least forty-eight (48) hours prior to the initial detention hearing may not give counsel adequate preparation and evaluation time so as to advise fully the Court or "neutral tribunal" of the circumstances of the child's condition and need for admission or, conversely, lack of need for confinement. We suggest that the initial hearing might better be held after several days rather than just three to permit a fuller hearing.

*Page 2, No. 4:* The right to free counsel for indigents must be based upon some objective standard of indigency, that is, whose assets are to be counted, those of parents, or others? Also, Philadelphia County is not included in the statewide Public Defender program as are the other sixty-six counties. Some standard for the entire state might best be written into the Order.

*Page 3, No. 7:* The probable cause hearing after seventy-two (72) hours may not provide sufficient time for preparation and therefore sufficient evidence for proper evaluation by the Court or "neutral tribunal." There may be no opportunity for judicial "thinking time" as to probable cause for institutionalization. We are unsure as to the standard of proof, labeled as "clear and convincing," set forth at No. 6 and the role of the factfinder with respect to it. We would request clarification of this point.

*Page 3, No. 3:* The full commitment hearing after two weeks gives us more reassurance in terms of preparation time and evaluation of evidence, although we are not sure how much more can be adduced in an additional eleven (11) days. Perhaps, the second

hearing should be held two weeks after the first hearing to provide a longer evaluation period. Then, is the standard of proof stricter at this second, more conclusive hearing? If so, how is such a second standard determined?

*Page 4, No. 11:* The use of the state courts is clearly required by the Order, in general terms, until the Legislature designates an "alternate neutral tribunal." The Court Administrator of Pennsylvania has proposed for adoption by the Supreme Court of Pennsylvania a Rule providing for the appointment of a master at each institution, where possible, to hear these matters promptly and efficiently. A copy of the draft Rule is attached.*

*Page 5, No. 14:* The provision for waiver of certain rights by the child to be instutionalized may be too broad, in that informed waiver by children is still an interpretative area of the law. We urge the Court to be aware of, and sensitive to this concern, so that too broad waiver powers are not here granted.

We are aware that perhaps five thousand hearings or more may have to be conducted within the next several months, and are preparing to shoulder that hearing responsibility with full cooperation to your Honorable Court. We do wish, however, to make the burden as administratively and financially palatable as possible for our statewide court system.

We look forward to meeting with you further, if you deem it appropriate, and thank you for your courtesy to date. We earnestly hope that this effort will mark the beginning of formal communication between the

*The draft has not yet been approved by the Supreme Court, and will follow shortly.



Court Administrator on behalf of the Pennsylvania Judicial System and the Federal Court system.

With best regards,

Very truly yours,

Alexander F. Barbieri
Court Administrator of
Pennsylvania

By: Jonothan Vipond, III
Legal Assistant to the
Court Administrator

JV:ml

Enclosure

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

DANIEL H. HUYETT, 3RD
JUDGE

12614 UNITED STATES COURTHO
INDEPENDENCE MALL WEST
PHILADELPHIA, PENNSYLVANIA 19
215-597-9644

November 11, 1975

Jonathan Vipond, III, Esquire
Legal Assistant to the
Court Administrator
Administrative Office of
Pennsylvania Courts
317 Three Penn Center Plaza
Philadelphia, Pa. 19102

Re: *Bartley, et al. v. Kremens, et al.*
*(C.A. No. 72-2272)*

Dear Mr. Vipond:

I appreciate very much your October 15, 1975 letter.

I have conferred with Judge Gibbons and Judge Broderick, the other members of the three-Judge court, and I have suggested to them a number of changes in the final Order which they now have under consideration.

I note that you state in your letter that the Pennsylvania judicial system is preparing to implement our opinion and you advise me that the Supreme Court of Pennsylvania has under consideration a rule for the appointment of a master at each institution. The master system, I believe, will be most helpful and certainly expedite the entire procedure in an efficient manner.



I make the following response to the specific comments on pages 2 and 3 of your letter.

*Page 2, No. 3:* The initial detention hearing is only a probable cause hearing that could be conducted by a master or even by a local District Justice. A probable cause hearing involves only a low-level decision and Pennsylvania District Justices as well as attorneys generally throughout the commonwealth have had vast experience in probable cause hearings. The fuller hearing that you suggest is not required at that stage of the proceedings. Also, to modify the 48-hour notice requirement would necessitate an amendment to our opinion which would not appear to be required considering the nature of a probable cause hearing.

*Page 2, No. 4*: You mention that there is a statewide Public Defender program and also, of course, Philadelphia County has its own defender organization. These defender organizations certainly have clear standards as to what constitutes indigency. I respectfully suggest that there is no problem as to a determination for purposes of implementation of our opinion of the meaning of indigency and we as a Federal Court certainly would be extremely reluctant to lay down a standard for the entire state as you suggest, particularly where it does not appear to be required.

*Page 3, No. 7*: As I stated above, the initial detention hearing is only a probable cause hearing and not a full hearing and State Court personnel have had considerable experience with probable cause hearings which generally take place on short notice. In respect to the standard of proof "clear and

convincing", I respectfully suggest that the law of Pennsylvania is clear as to the meaning of these words and that the judicial officer who conducts the full commitment hearing would have no problem.

*Page 3, No. 8:* The initial detention hearing, of course, is only a probable cause hearing. The full commitment hearing is another matter and the standard of proof there is "clear and convincing". I believe the standard of proof at the two different hearings is clear from our opinion and again your suggestion would require an amendment of our opinion which would not seem desirable.

*Page 4, No. 11*: As I mentioned above, I believe that the adoption of a master system would be most helpful and I would hope that the Pennsylvania Supreme Court would adopt the proposed rule.

*Page 5, No. 14*: We have reconsidered our opinion in respect to waiver and your suggestion would require us to amend our opinion in a substantive way which we decline respectfully to do.

I hope that these comments to your suggestions are helpful and certainly I wish to be as cooperative as possible with the Administrative Office of the Pennsylvania Courts.

The fact that a stay has been granted by the Court of Appeals will give you more time to prepare for all that is necessary to implement our opinion and this, of course, may ease the strain on the State judicial system.

Again, I appreciate very much your letter and your suggestions and I intend to call Judge Barbieri to make



sure that he is satisfied that I have covered all of the points which require discussion at this time.

With kindest personal regards.

Very sincerely yours,

/s/ Daniel H. Huyett, 3rd
Daniel H. Huyett, 3rd

DHH/dr
cc to Hon. John J. Gibbons
Hon. Raymond J. Broderick

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

DANIEL H. HUYETT, 3rd
JUDGE

12614 UNITED STATES COURTHOUSE
INDEPENDENCE MALL WEST
PHILADELPHIA, PENNSYLVANIA 19106
215-597-9644

November 17, 1975

Honorable Alexander F. Barbieri
Judge, Court Administrator of
Pennsylvania
317 Three Penn Center Plaza
Philadelphia, Pa. 19102

Re: *Bartley, et al. vs. Kremens, et al.*
*(C.A. No. 72-2272)*

Dear Judge Barbieri:

As you and I discussed by telephone today, I enclose a copy of the Order of the three-Judge court which was handed down today along with a copy of a stay of October 30, 1975 of the Court of Appeals for the Third Circuit which appears to stay our Order pending action by the United States Supreme Court.

Also, as I mentioned to you in our conversation, counsel for plaintiff called my office today and said that he believes that the stay of the Court of Appeals is ambiguous and he will seek a clarification from the Court of Appeals.

It is necessary for the three-Judge court to hand down its Order since the United States Supreme Court



cannot act without a final order of the three-Judge court.

I shall, of course, keep you fully advised.

Very sincerely yours,

/s/ Dan
Daniel H. Huyett, 3rd

DHH/dr
Enclosures
cc to Honorable John J. Gibbons
Honorable Raymond J. Broderick

P.S. to Judges Gibbons and Broderick: Enclosed are two fully conformed copies of our November 17, 1975 Order.

D.H.H.

SUPREME COURT OF PENNSYLVANIA

ADMINISTRATIVE OFFICE OF PENNSYLVANIA COURTS
317 THREE PENN CENTER PLAZA
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DEPUTY COURT ADMINISTRATORS
CARLILE E. KING, ESQUIRE
GERALD W. SPIVACK, ESQUIRE
ROBERT F. KENT, ESQUIRE

November 20, 1975

RECEIVED
NOV 24 1975

The Honorable Daniel H. Huyett, 3rd
United States District Court
Eastern District of Pennsylvania
12614 United States Courthouse
Independence Mall West
Philadelphia, Pa. 19106

Dear Judge Huyett:

Re: *Bartley, et al. v. Kremens, et al.*
*(C.A. No. 72-2272)*

I very much appreciate your comprehensive response to my letter of October 15, 1975 setting forth various comments and suggestions with respect to a proposed Order in the above matter. Both Judge Barbieri and I do appreciate your extreme courtesy and earnestly hope that this marks the beginning of a fully cooperative relationship between the Federal Court system and the Administrative Office of Pennsylvania Courts.



Judge Barbieri and I have subsequently received your Final Order and have reviewed it. The Supreme Court has not yet formulated a rule to implement your Order and is most concerned about the gargantuan burden about to be placed on the court system of Pennsylvania. I believe that my earlier letter to you merely recognized the potential responsibility which your opinion and Order place on the State Judiciary and did not set forth our willingness or practical ability to shoulder the burden. A rule may yet be adopted but the Supreme Court simply does not have the present manpower and fiscal resources to conduct between five and eight thousand hearings. We wish to be cooperative to the maximum extent, but cannot perform the impossible.

We look forward to continued discussions with you in the further disposition of this case.

With best regards.

Very truly yours,

Alexander F. Barbieri
Court Administrator of
Pennsylvania

By: Jonathan Vipond, III
Legal Assistant to the
Court Administrator

JV:ml

cc: Norman J. Watkins, Esq.
The Honorable Alexander F. Barbieri

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

DANIEL H. HUYETT, 3rd
JUDGE

12614 UNITED STATES COURTHOUSE
INDEPENDENCE MALL WEST
PHILADELPHIA, PENNSYLVANIA 19106
215-597-0644

November 25, 1975

Jonathan Vipond, III, Esquire
Legal Assistant to the Court
Administrator
Administrative Office of
Pennsylvania Courts
317 Three Penn Center Plaza
Philadelphia, Pa. 19102

Re: *Bartley, et al. vs. Kremens, et al.*
*(C.A. No. 72-2272)*

Dear Mr. Vipond:

I appreciate very much your November 20, 1975 letter.

Very sincerely yours,

/s/ Daniel H. Huyett, 3rd
Daniel H. Huyett, 3rd

DHH/dr



SUPREME COURT OF PENNSYLVANIA

ADMINISTRATIVE OFFICE OF PENNSYLVANIA COURTS
317 THREE PENN CENTER PLAZA
PHILADELPHIA, PENNSYLVANIA 19102
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ALEXANDER F. BARBIERI
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COURT ADMINISTRATOR OF PENNSYLVANIA

DEPUTY COURT ADMINISTRATORS
CARLILE E. KING, ESQUIRE
GERALD W. SPIVACK, ESQUIRE
ROBERT F. KENT, ESQUIRE

November 26, 1975

RECEIVED
DEC 1 1975

The Honorable Daniel H. Huyett, 3rd
Room 12614, 601 Market Street
Philadelphia, Pennsylvania 19106

Dear Judge Huyett:

Re: *Bartley v. Kremens*

I have just read over the file in this matter, and find that Jon Vipond has expressed the view that a rule of court might be requested of our Supreme Court by this Office.

I think it only fair to advise you that no such rule has been authorized or is presently being contemplated by the Supreme Court. It was a cooperative suggestion of Mr. Vipond, and one that I had considered a possible expedient, if any effort was to be made to implement your order.

Since your order is on appeal, and since our study of your recent order indicates that it contains directives

which would require judicial or other action by our courts, which would be contrary to law in Pennsylvania, it will be necessary for this Office to join in the appeal. We will also join in objections advanced by the Attorney General, adding others of our own that stem from the incapability of the judicial system of Pennsylvania to comply.

Very truly yours,

/s/ A. F. Barbieri
Alexander F. Barbieri
Court Administrator of Pennsylvania

AFB:ek